

holding should be limited to the context of statutory claims. Midway, like the *Remijas* plaintiffs, brought common-law claims of negligence and breach of implied contract. *Remijas*, 704 F.3d. at 690; *Midway*, at 8. *Remijas* still serves as precedent in this Court for common-law claims.

Even if this Court concludes that *TransUnion* is applicable, Midway still has standing. First, Midway’s facts are most similar to those of Group A. Third parties actually accessed Midway’s and Group A’s personal information. Second, both Group A and Midway suffered intangible harms that are closely related to those traditionally recognized as having a basis for lawsuits in U.S. courts. Midway’s injuries qualify as concrete because of the intangible future harm’s close relationship to disclosure of private information. *TransUnion* indicated “disclosure of private information” as a claim traditionally recognized by U.S. courts. *TransUnion*, 141 S. Ct. at 2204. There is a close relationship between the increased risk from the data breach and disclosure of private information.

Pierre’s interpretation of *TransUnion* should be limited to the domain of statutory violations and should not apply to Midway. Although the district court relied on these cases, neither dealt with data breaches, nor common law claims. *Pierre* summarizes *TransUnion*’s conclusion as “a risk of harm qualifies as a concrete injury only for claims for ‘forward-looking, injunctive relief to prevent the harm from occurring.’” *Pierre*, at 29 F. 4th 934 (quoting *TransUnion*, 141 S. Ct. at 2210). Although not explicitly stated, this court should conclude that *Pierre* interprets *TransUnion* on the backdrop of injuries in law. *Pierre* mischaracterized *TransUnion*, saying that “a plaintiff seeking money damages has standing to sue in federal court only for claims that have in fact materialized.” *Id.* This cannot be applied to common law claims because the harms in *Remijas* had not materialized, but the *Remijas* court determined that the harms were concrete and allowed plaintiffs to proceed with their claims for damages. *Remijas*,

704 F.3d at 697. *Pierre* misinterpreted *TransUnion*'s conclusion that a "plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages." *TransUnion*, 141 S. Ct. at 2210. The court should take away the following from *TransUnion*: (1) plaintiffs claiming harms from statutory violations may seek injunctive relief, and (2) plaintiffs claiming harm from statutory violations may not seek monetary damages unless a harm has materialized. *TransUnion* simply reiterated the fact that injuries in law do not automatically constitute injuries in fact. In conclusion, *Pierre* should not serve as precedent to this case because Midway does not allege statutory violations.

Applicant Details

First Name	Noah
Last Name	Chase
Citizenship Status	U. S. Citizen
Email Address	nchase@albanylaw.edu
Address	<div> Address Street 811 Madison Ave., Apt #7 City Albany State/Territory New York Zip 12208 Country United States </div>
Contact Phone Number	6075917368

Applicant Education

BA/BS From	University of Minnesota-Twin Cities
Date of BA/BS	May 2020
JD/LLB From	Albany Law School
	http://www.albanylaw.edu/
Date of JD/LLB	May 19, 2024
Class Rank	25%
Law Review/Journal	Yes
Journal(s)	Albany Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Anthony V. Cardona Moot Court

Bar Admission**Prior Judicial Experience**Judicial Internships/Externships **Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Hirokawa, Keith
khiro@albanylaw.edu
518-445-3360

Tenenbaum, Evelyn
etene@albanylaw.edu

Leydecker, Meghan
meghan.leydecker@usdoj.gov
716-954-0709

Bonanno, Paul
Paul.Bonanno@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

NOAH CHASE

nchase@albanylaw.edu ☐ (607) 591-7368 ☐ [linkedin.com/in/noahschase](https://www.linkedin.com/in/noahschase)
811 Madison Ave., Apt #7, Albany, NY 12208

June 11, 2023

The Honorable Juan R. Sánchez
U.S. District Court, Eastern District of Pennsylvania
James A. Byrne Federal Courthouse
601 Market Street, Courtroom 14-B
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am a rising third-year student at Albany Law School where I am the current Managing Editor of ALBANY LAW REVIEW and am in the top 22.8% of my class. I am writing to apply for a 2024–2025 clerkship in your chambers.

I am particularly interested in a clerkship with you due to your public service and my passion thereof. My grandfather, public defender of the small town where I grew up, once said, “Life without helping others is no life at all.” I focus on living by these words. Additionally, I pride myself in my eagerness to learn, to always be curious, and to rise to any challenge, traits which I will adamantly pursue to serve your chambers well.

Enclosed within, please find my resume, law school transcript, and writing sample. The writing sample is a Habeas Corpus recommendation I drafted while interning with Judge Daniel J. Stewart of the United States District Court for the Northern District of New York. I received permission from Judge Stewart to use this as my writing sample.

Professor Tenenbaum, Professor Hirokawa, Assistant United States Attorney Paul Bonanno, and Assistant United States Attorney Meghan Leydecker have written letters of recommendation in support of my candidacy. The contact information for these individuals is provided in the enclosed list of references.

Please let me know if I can provide any additional information. Thank you for your consideration.

Sincerely,



Noah Chase

NOAH CHASE

nchase@albanylaw.edu · (607) 591-7368 · [linkedin.com/in/noahschase](https://www.linkedin.com/in/noahschase)
811 Madison Ave., Apt. #7, Albany, NY 12208

EDUCATION**ALBANY LAW SCHOOL OF UNION UNIVERSITY**

Albany, NY
May 2024

Candidate for Juris Doctor

Class Rank: *Top 22.8% (GPA: 3.64).*

Honors: Executive Managing Editor, ALBANY LAW REVIEW VOL. 87

Dean's List, Spring '22, Fall '22, & Spring '23

Awards: Dale Van Epps '66 Memorial Scholarship

Joseph C. Foadelli Public Service Fellowship

Activities: Research Assistant, Professor Howard Zwickel

Research Assistant, Professor Ray Brescia

Teaching Assistant, Professor Evelyn Tenenbaum

Teaching Assistant, Professor Keith Hirokawa

Moot Court Board, Phi Alpha Delta, Criminal Law Society

UNIVERSITY OF MINNESOTA

Minneapolis, MN

Bachelor of Science, Sociology of Law, Criminology and Deviance; Minor: Philosophy

May 2020

Activities: Student DJ, Radio K

Founding Father, Vice President of Standards, Alpha Sigma Phi Fraternity

Study Abroad Program: University of Auckland, Auckland, New Zealand, May 2018

Certifications: Securities Industry Essentials; Life, Accident, Health Insurance License

EXPERIENCE**HON. MAE A. D'AGOSTINO, U.S. DISTRICT JUDGE**

Albany, NY

Legal Intern

To Commence Aug. 2023

HODGSON RUSS

Albany, NY

Summer Associate

May 2023 – Present

- Rotational program throughout various practices groups, working for partners on substantive research, specifically in State and Local Tax and Litigation.

HON. DANIEL J. STEWART, U.S. MAGISTRATE JUDGE

Albany, NY

Legal Intern

Jan. 2023 – May 2023

- Aided in drafting, researching, and editing opinions and participated in discussions on decisions and case merits.

ALBANY COUNTY DISTRICT ATTORNEY'S OFFICE

Albany, NY

Legal Intern

Aug. 2022 – Dec. 2022

- Assisted in trial preparation, legal research, and memoranda drafting.

- Appeared on the record in bail application and detention hearings.

UNITED STATES ATTORNEY'S OFFICE, W.D.N.Y.

Buffalo, NY

Summer Legal Intern

May 2022 – July 2022

- Completed legal research and writing, including investment fraud, evidentiary suppressions, and pleas.
- Worked with Assistant United States Attorneys on case development and formulation of legal strategy.

DAILYPAY, INC.

Minneapolis, MN

Customer Support Representative

Oct. 2020 – July 2021

- Handled high volume of calls and assisted clients in understanding complicated financial technology.

INVOLVEMENT**THE ADVOCATES FOR HUMAN RIGHTS**

Minneapolis, MN

Court Monitoring Volunteer

Dec. 2019 – July 2021

- Tracked and recorded pertinent information, while observing a variety of court proceedings.

ROTARY INTERNATIONAL

Copenhagen, Den.

Short Term Youth Conference

Aug. 2018 – Sept. 2018

- Chosen to represent rotary clubs in an educational conference, participating in international dialogue.

CHASE, NOAH S.
06/08/2023

TRANSCRIPT OF RECORD

ISSUED:

Student No. 0587698-1119

ALBANY LAW SCHOOL
80 New Scotland Avenue, Albany, NY 12208
Telephone 518-445-2330
Fax 518-472-5889

Page 1 of 1

Matriculated: 08/23/2021 Program: JD 3 Year Anticipated Degree Date: 05/24

CR.HR GRADE QPTS					CR.HR GRADE QPTS				
FALL 2021 (08/23/2021 to 12/20/2021)					SPRING 2023 (01/16/2023 to 05/17/2023)				
CONX CCHUN	Contracts	3.0	A-	11.1	*DEAN'S LIST*				
CIVP RQUEE	Federal Civil Procedure	4.0	B+	13.2	ADEV MHUTT	Advanced Evidence	2.0	A-	7.4
ILWF LJIM	Introduction to Lawyering	3.0	B+	9.9	ANTR ASEIT	Antitrust: Trade Practices	3.0	A	12.0
LWJS AOUEL	Law & Justice:An Introduction	1.0	B	3.0	JDPL RKRET	CLN: Judicial FDPL Classroom	1.0	A+	4.3
TORT ETENE	Torts	4.0	A	16.0	FDPL JLCON	CLN:Field Placement	4.0	P
Averaged: 15.00		Earned: 15.00		Q.Pts: 53.20	LRME VBONV	Law Review (Membership)	1.0	CR
SEM: GPA	3.55 Rank 50/193	CUM: GPA	3.55 Rank 50/194		LRWT VBONV	Law Review (Writing)	1.0	CR
					ELDT JROSE	Law of Climate Chng:Dom/Trans	2.0	A	8.0
SPRING 2022 (01/18/2022 to 05/18/2022)					TRES DPRAT	Trusts and Estates	3.0	A-	11.1
DEAN'S LIST					Averaged: 11.00		Earned: 17.00		Q.Pts: 42.80
CNSL SCLAR	Constitutional Law	4.0	B	12.0	SEM: GPA	3.89 Rank 30/188	CUM: GPA	3.64 Rank 43/188	
CONT CCHUN	Contracts	2.0	B	6.0					
CRIM VBONV	Criminal Law	3.0	B+	9.9	TOTALS	Averaged: 58.00	Earned: 73.00	Q.Pts: 211.10	
ILWS LJIM	Introduction to Lawyering	3.0	A	12.0					
PROP KHIRO	Property	4.0	A	16.0	Satisfied Upperclass Writing Requirement				
Averaged: 16.00		Earned: 16.00		Q.Pts: 55.90					
SEM: GPA	3.49 Rank 48/190	CUM: GPA	3.52 Rank 51/190	STUDENT IN GOOD STANDING UNLESS OTHERWISE INDICATED					
NOT VALID AS OFFICIAL WITHOUT SIGNATURE AND SEAL									
SUMMER 2022 (05/23/2022 to 07/15/2022)									
SPRA DMANN	CLN-Summer in Prac(Fld Plcmt)	5.0	P					
SPRC DMANN	CLN-Summer in Prc/Classroom	1.0	A	4.0					
LPRF CMAYE	Legal Profession	3.0	B-	8.1					
Averaged: 4.00		Earned: 9.00		Q.Pts: 12.10					
SEM: GPA	3.03	CUM: GPA	3.46						
FALL 2022 (08/22/2022 to 12/21/2022)									
DEAN'S LIST									
DAPL RMERG	CLN:Alb Cnt DA FDPL Classroom	1.0	A	4.0					
FDPL JLCON	CLN:Field Placement	4.0	P					
FIRS SCLAR	Con Law II: First Amendment	2.0	A+	8.6					
CPIN AFARL	Criminal Procedure:Investigtgn	3.0	A-	11.1					
EVDC MHUTT	Evidence	4.0	A	16.0					
SLTX JBOLL	State and Local Taxation	2.0	A-	7.4					

Averaged: 12.00 Earned: 16.00 Q.Pts: 47.10
SEM: GPA 3.93 Rank 26/184 CUM: GPA 3.58 Rank 47/185



ALBANY LAW SCHOOL

**80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
TEL: 518-445-3360
FAX: 518-472-5878 WWW.ALBANYLAW.EDU**

Keith Hirokawa
Associate Dean of Research and Scholarship and Distinguished Professor of Law
khiro@albanylaw.edu

April 29, 2023

Re: Noah Chase

To Whom It May Concern:

I am so pleased to write this letter in support of Noah Chase as an applicant for a judicial clerkship. Noah has consistently demonstrated the highest personal standards of achievement, a productive work ethic, and a contagious sense of professionalism. Noah is extremely talented and I believe he would make an excellent judicial law clerk.

In his first year of law school, Noah quickly mastered lawyering skills: effective research and critical comprehension of case law and policy; a deep understanding of complex jurisprudential perspectives; and, the ability to clearly communicate his research findings, both orally and in written memoranda. I have since asked Noah to work with me as my teaching assistant for Property, and his assistance has had a remarkable impact on the confidence and competence of the first-year students.

Noah's accomplishments and his strong sense of professionalism have been acknowledged by his peers and my colleagues. He is driven by the value of deliberate and intentional dialogue. His teaching style illustrates inclusive communication and respect for others. Property students regularly report on the benefits of his assistance. He is accessible, thoughtful, and insightful. Noah always goes beyond what is required. He will be an excellent judicial law clerk.

Thank you for allowing me the opportunity to support Noah in this way. I am happy to be available at your convenience to discuss any questions or concerns that you may have.

Sincerely,

Keith Hirokawa

Keith H. Hirokawa

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter of recommendation for Noah Chase, a rising third-year student at Albany Law School. During his first year at Albany Law, Noah was a student in my Torts class and during his second year, he was a teaching assistant for that class. As you can tell from this history, I think very highly of Noah, both as a scholar and person and am delighted to have this opportunity to tell you about him.

Noah did very well in my Torts class. In fact, he did so well that I hired him to be my teaching assistant. Noah's comments in class were consistently thoughtful and articulate and demonstrated his strong grasp of the subject matter. In addition, his exam highlighted his strong analytical skills and writing ability. Noah also shone as my teaching assistant. In that role, he co-taught two review sessions, commented on student papers, and met with students on an individual basis. In performing these tasks, Noah was very well-organized and detail oriented. He was always the first to let me know if a student had some concern that only I could help with and to remind me – at my request – if something needed to be done. He also has terrific interpersonal and analytical skills and worked very well with my other two teaching assistants and with the students. In addition, Noah volunteered to help write one of the practice assignments I hand out to the students during the semester even though I generally create those assignments myself. He worked with another of the teaching assistants on that project and the problem they designed was very well-done and performed its teaching purpose beautifully. On top of that, the students really enjoyed the assignment. On my end-of-the semester teaching evaluations, students in the class rarely comment on the performance of the teaching assistants, but this year, my Torts students made the extra effort of calling out the TAs for their help with Torts concepts and with navigating the first year of law school.

Noah is a very good choice for a judicial clerkship. Not only does he have the analytical, writing, and oral skills to be an excellent student and teaching assistant, but he has also demonstrated his interest in a judicial clerkship by clerking during law school for the Hon. Daniel J. Stewart, a Magistrate Judge in the Northern District of New York. Although he is only a second-year law student, Noah has also gained practical experience working for the Albany County District Attorney's Office and the U.S. Attorney's Office for the Northern District of New York. Next year, he will further his skills by acting as Executive Managing Editor of the Albany Law Review. Noah is also focused on obtaining a clerkship, which he believes will allow him to expand his skills and gain perspective on his future career.

I highly recommend Noah for a judicial clerkship. Besides being an excellent student, he is dependable, motivated, enthusiastic, and a real pleasure to work with. If you would like any further information, please feel free to contact me.

Very truly yours,

Evelyn M. Tenenbaum
Professor of Law
etene@albanylaw.edu
518-445-3375

Evelyn Tenenbaum - etene@albanylaw.edu



U.S. Department of Justice

*United States Attorney
Western District of New York*

*Federal Center
138 Delaware Avenue
Buffalo, New York 14202*

*716/843-5700
fax 716/551-3052
Writer's Telephone: 716/843-5821
Writer's fax: 716/551-3196
Meghan.Leydecker@usdoj.gov*

May 2, 2023

To Whom it May Concern:

I am writing on behalf of Noah Chase regarding his judicial clerkship application. I am currently the Deputy Chief of the Narcotics and Organized Crime Section for the United States Attorney's Office in the Western District of New York. During the Summer of 2022, I was responsible for coordinating the Summer Law Clerk program for our district. Noah was one of our summer clerks. During the ten-week summer program, I became familiar with Noah and his abilities.

Noah's strong work ethic and determination were on display throughout his clerkship. He was diligent in completing assignments and acted responsibly and professionally in our workplace. Our clerkship offers opportunities for legal research and writing on both federal criminal and civil practice issues. Law clerks also have the ability to observe court proceedings and participate in law enforcement and witness preparation meetings. Noah was engaged in each of his assignments and invested in learning as much as possible throughout the summer.

Noah exhibited a curiosity for the subject matter that, in my experience, is rarely encountered with law students in this arena. He asked probing questions and frequently demonstrated his familiarity with the subject matter. Noah was a pleasure to supervise during his time with the US Attorney's Office.

I believe that Noah would be successful as a judicial law clerk and an asset at the position. He has proven to be a highly diligent and professional employee, but is also devoted to pursuing justice and, more simply, doing the right thing. That combination of attributes would suit him well to hold such an important position within the judicial system. If you have any questions, please contact me at the above phone number or email address.

Sincerely,

TRINI E. ROSS
United States Attorney

BY: *Meghan Leydecker*
MEGHAN LEYDECKER
Assistant United States Attorney



U.S. Department of Justice

*United States Attorney
Western District of New York*

*Federal Center
138 Delaware Avenue
Buffalo, New York 14202*

*716/843-5700
fax 716/551-3052
Writer's Telephone: 716/843-5873
Paul.Bonanno@usdoj.gov*

May 26, 2023

To Whom It May Concern,

I write to recommend Noah Chase for a position as a judicial clerk. Noah worked closely with me during the summer of 2022 while he was interning in my office. Most significantly, Noah worked with me on a complicated securities fraud investigation relating to a public company. The alleged fraud spanned a number of years and involved complicated securities transactions. Over the course of the summer, I asked Noah to research several difficult legal issues related to potential securities fraud charges. This research required Noah to delve into stock registration requirements, rules related to private placements of stock, and implications of delisting stock. No matter how complex the issue, Noah enthusiastically and capably took on the assignment. He ultimately wrote several helpful memoranda in which he cogently analyzed the relevant statutes and case law. Noah also examined a number of dense SEC filings related to the public company and was able to summarize the filings clearly and concisely. In short, while still only a law student, Noah provided invaluable assistance over the summer.

In addition, throughout his time with my office, Noah acted professionally and demonstrated the judgment and temperament necessary to be a successful judicial clerk and lawyer. He also demonstrated true passion for public service. I think Noah is an outstanding candidate to be a judicial clerk and I highly recommend him.

Very truly yours,


PAUL E. BONANNO
Assistant United States Attorney

NOAH CHASE
WRITING SAMPLE

nchase@albanylaw.edu · (607) 591-7368 · [linkedin.com/in/noahschase](https://www.linkedin.com/in/noahschase)

The attached writing sample is an excerpt from a Habeas Corpus Report and Recommendation Memorandum that I drafted while interning for the Honorable Daniel J. Stewart, Magistrate Judge for the United States District Court for the Northern District of New York.

I was the sole author and editor of the selected portion and have received permission from Judge Stewart's chambers to use this Memorandum as a writing sample. Any changes made were to either: preserve confidentiality prior to publication, pending District Judge review; or, for the purposes of adopting this Memorandum to be used as a writing sample. Footnotes have been added in some sections to aid in the understanding of this excerpt. All deviations from Bluebook citations were according to the chamber's style guide rules. Finally, any errors are my own, and not a reflection of Judge Stewart's chambers.

The selected portion examines Petitioner's claims of ineffective assistance of counsel; both of his trial counsel and his appellate counsel. The entirety of the drafted opinion was thirty-three pages and analyzed six claims raised by Petitioner. The report recommended denying the Petition. Petitioner's six claims for Habeas review were: (1) the People failed to prove that the "rifle" Petitioner possessed was a "semiautomatic" weapon; (2) the trial court failed to instruct the jury on all the elements of criminal possession of a weapon; (3) the conviction violated his Second Amendment rights; (4) the evidence seized was a violation of his Fourth Amendment rights; (5) he was denied effective assistance of trial counsel; and (6) he was denied effective assistance of appellate counsel.

The basis of this habeas petition was Petitioner's conviction of second-degree criminal possession of a weapon and second-degree reckless endangerment. Petitioner and another individual shot at each other outside an apartment complex, leading to Petitioner's apprehension and subsequent indictment.

E. Claim Five: Effective Assistance of Trial Counsel

The Supreme Court, in *Strickland v. Washington*, set the standard for ineffective assistance of counsel, where it was required to consider if the Constitution demanded that a criminal defendant's conviction must be "set aside because counsel's assistance at trial or sentencing was ineffective." 466 U.S. 668, 671 (1984). From *Strickland*, and lasting still, the requirements for such a claim are that "[t]he defendant must show that there is a reasonable probability that, *but for counsel's unprofessional errors*, the result of the proceeding would have been different." *Id.* at 694 (emphasis added). Further, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695. The *Strickland* decision set forth two specific ideations from which such claims are analyzed through: First, the defendant must show that his attorney's actions "were outside the wide range of professionally competent assistance," rather than potentially strategic decisions. *Id.* at 690–91. Second, it must be shown that these actions had an "effect on the judgment." *Id.*

The first prong of the *Strickland* analysis "is necessarily linked to the practice and expectations of the legal community," to which the Court has

“long recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable’” *Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010) (quoting *Strickland v. Washington*, 466 U.S. at 688) (collecting cases). Such guides are important measures of the legal community and the “prevailing professional norms” of what is effective representation, to compare against what is not. *See id.* at 367. “[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance, and [the Court has] held that a lawyer’s violation of ethical norms does not make the lawyer *per se* ineffective.” *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (citing *Mickens v. Taylor*, 535 U.S. 162, 171 (2002)); *see also Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Therefore, it follows that Petitioner must demonstrate that his counsel’s errors were such that counsel was effectively unreasonable. *See Harrington v. Richter*, 562 U.S. 86, 104 (2011) (“The challenger’s burden is to show ‘that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.’” (quoting *Strickland v. Washington*, 466 U.S. at 687)).

The second prong of the *Strickland* analysis requires that the challenger shows that “[c]ounsel’s errors [were] ‘so serious as to deprive the

defendant a fair trial, a trial whose result is reliable.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 687). This standard is high, and high for a reason as such claims “can function as a way to escape rules . . . and raise issues not presented at trial.” *Id.*; see also *Padilla v. Kentucky*, 559 U.S. at 357 (“Surmounting *Strickland*’s high bar is never an easy task.”). Such standard “must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve.” *Harrington v. Richter*, 562 U.S. at 105 (quoting *Strickland v. Washington*, 466 U.S. at 689–90). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. at 8 (citing *Strickland v. Washington*, 466 U.S. at 690). This “presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court ‘may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.’” *Id.* (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). “After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better.” *Harrington v. Richter*, 562 U.S. at 109. This prejudicial prong does not ask “whether it is possible a reasonable doubt might have been established if counsel acted differently[.]”

instead, “*Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Id.* at 111–12 (internal citations omitted) (first citing *Wong v. Belmontes*, 558 U.S. 15, 27 (2009); and then quoting *Strickland v. Washington*, 466 U.S. at 696). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112 (citing *Strickland v. Washington*, 466 U.S. at 693).

Petitioner reiterates his prior claims¹ and assigns fault for each of them not being raised to his counsel at trial. *See* Pet. Mem. at 57–67.² Without belaboring the above discussions, it is under the *Strickland* analysis which each of these points must be decided; whether counsel’s actions would be considered reasonable to the legal profession, and if such actions deprived Petitioner of a fair trial, having an effect on the outcome. *See Strickland v. Washington*, 466 U.S. at 687–88, 693. As evidenced by the legal considerations to each of Petitioner’s four prior points, the arguments which Petitioner now assigns blame onto his trial counsel are unreasonable and must fail as a matter of law. Finding such, it cannot be said that Petitioner’s

¹ Petitioner raised four other claims, prior to this one, and each was again repeated within his claim of ineffective assistance of counsel. Each prior claim was analyzed through the legal and procedural standards set forth by 28 U.S.C. § 2254 and the Antiterrorism and Effective Death Penalty Act of 1996. Petitioner’s prior claims were: (A) the rifle in his possession was not a semiautomatic weapon; (B) the trial jury instructions lacked all the elements of the charged crime; (C) the charged crime violated his Second Amendment rights; and (D) Petitioner’s Fourth Amendment rights were violated.

² Citations to the Petitioner’s Memorandum of Law is in the form of “Pet. Mem.” followed by the page numbers assigned by the Court’s CM/ECF system.

trial counsel failed to raise arguments, motions, or objections which this Court finds unsupported in its analysis. Petitioner argues his counsel's "failure to request the statutory definition of 'semiautomatic' and the exceptions included in the definition of an assault weapon" and "failure to object to erroneous jury instructions and trial court's abuse of discretion in ruling that the expectations to the assault weapon had to be raised as an affirmative defense" create an ineffective assistance of counsel claim. Pet. Mem. at 60, 61. Yet such claims are without merit, as discussed above, and had counsel raised either issue no change in the outcome would have occurred specifically for that such reason.

Penultimately, Petitioner misunderstands trial testimony and argues that his counsel's failure to "object to the prosecution's use of inadmissible hearsay [evidence] violated Petitioner's clearly established right to confront witnesses against him." Pet. Mem. at 64. Petitioner argues that Officer ██████'s testimony of what Ms. ██████ told him was inadmissible hearsay; yet, at trial, the prosecution asked Officer ██████ "With what authority did you have to enter [the apartment]?" to which Officer ██████ replied, "██████ gave us permission to enter." SR. at 316.³ This is not hearsay, as hearsay "evidence [i]s testimony in court . . . of a statement made out of court,

³ Citations to the state court record is in the form of "SR." followed by the page numbering provided by Respondent.

the statement being offered as an assertion to show the truth of matters asserted therein.” *Ohio v. Roberts*, 448 U.S. 56, 62 n.4 (1980). No statement was offered by Officer [REDACTED] to be accepted as true, rather being offered to illustrate Officer [REDACTED]’s state of mind, and such difference exemplifies the misunderstanding which underlies Petitioner’s claim. *Compare id.*, with SR. at p. 316.

Finally, Petitioner argues that his counsel’s “failure to object to [the] trial court’s failure to rule on [his] motion for a trial order of dismissal” rose to the level of ineffectiveness. *See* Pet. Mem. at p. 66–67. After the prosecution rested, Petitioner’s counsel moved for a “trial order of dismissal” arguing that the prosecution “failed to establish the necessary elements in each and every count.” SR. at p. 395–96. As evidenced by the record, this motion was denied. *See* SR. at p. 396–98. The trial judge reserved a portion pertaining to the jury instructions, a point which was later revisited after the defense rested, where such portion was subsequently denied. *Compare* SR. at p. 398, with SR. at p. 405–08. Both of these motions represent Petitioner’s counsel acting diligently to represent Petitioner; the denials of said motions do not present any prejudicial acts from which Petitioner can base an ineffective assistance of counsel claim, nor would such acts constitute requisite deprivation of a fair trial. *See Strickland v. Washington*, 466 U.S. at 687–88, 693.

Absent any showing that conduct by Petitioner's trial counsel was unreasonable for an attorney in such a position, and that such conduct rose to the level proscribed by *Strickland*, Petitioner's claim of ineffective assistance of counsel must fail.

F. Claim Six: Effective Assistance of Appellate Counsel

While the Supreme Court has stated that "[t]here is . . . no constitutional right to an appeal" it has also held "that a state must provide counsel for an indigent appellant on his first appeal as of right." *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also Entsminger v. Iowa*, 386 U.S. 748, 751 (1967). The *Strickland* analysis and standard is applicable to appellate counsel. *See Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) ("[T]he *Strickland* test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, [and] the same test is used with respect to appellate counsel." (citing *Claudio v. Scully*, 982 F.2d 798, 803 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2347 (1993); *Abdurrahman v. Henderson*, 897 F.2d 71, 74 (2d Cir. 1990))). Therefore, the Petitioner "must establish that (1) the attorney's representation fell below an objective standard of reasonableness; and (2) the deficient representation prejudiced the defense." *Sellan v. Kuhlman*, 261 F.3d 303, 315 (2d Cir. 2001) (citing *Strickland v. Washington*, 466 U.S. at 687); *see also Hemstreet v. Greiner*, 491 F.3d 84, 89

(2d Cir. 2007); *Greiner v. Wells*, 418 F.3d 305, 313 (2d Cir. 2005); *Eze v. Senkowski*, 321 F.3d 110, 137 (2d Cir. 2003). While the standard from *Strickland* is maintained, the application to appellate counsel is slightly different; especially due to the noted differences in procedure, and “when [the time for] oral argument is strictly limited . . . and when page limits on briefs are widely imposed.” See *Jones v. Barnes*, 463 U.S. at 753 (citing Fed. Rule App. Proc. 28(g)); see also *Davila v. Davis*, 137 S. Ct. at 2066 (“The criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not.”).

To reiterate, when determining whether an attorney’s representation is deficient, “courts ‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *Bloomer v. United States*, 162 F.3d 187, 192–93 (2d Cir. 1998) (quoting *Strickland v. Washington*, 466 U.S. at 689). “[T]he presumption of reasonableness afforded an appellate attorney can be overcome if he neglected to raise significant and obvious issues while pursuing substantially weaker ones.” *Id.* at 193 (citing *Mayo v. Henderson*, 13 F.3d at 533). To demonstrate “appellate counsel’s failure to raise a state claim constitute[d] deficient performance” *Mayo v. Henderson*, 13 F.3d at 533, Petitioner must show that counsel “ignored issues [which were] clearly stronger than those presented.” *Gray v. Greer*, 800 F.2d

644, 646 (7th Cir. 1985) (citing *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991)). This is notably a high standard, one that is made more difficult due to the appellate procedure, especially as, if counsel had a duty to “raise every ‘colorable’ claim suggested by a client,” this would be a “disserv[ice to] the very goal of vigorous and effective advocacy.” See *Jones v. Barnes*, 463 U.S. at 754. “Nothing in the Constitution or [the Court’s] interpretation of that document requires such a standard.” *Id.* (footnote omitted). To meet the second *Strickland* prong of prejudice, a petitioner must show that “there was a reasonable probability that [his] claim would have been succe[ssful].” See *Claudio v. Scully*, 982 F.2d at 805; see also *Mayo v. Henderson*, 13 F.3d at 534. Therefore, it was due to appellate counsel’s failure that such claim was not brought or was not successful. See *Mayo v. Henderson*, 13 F.3d at 534; see also *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (“[T]he ‘prejudice component of the *Strickland* test . . . focuses on the question whether counsel’s deficient performance render[ed] the result of . . . the proceeding fundamentally unfair.” (citing *Strickland v. Washington*, 466 U.S. at 687; *Kimmelman v. Morrison*, 477 U.S. 365, 393 (1986) (Powell, J., concurring))).

Petitioner claims that his appellate counsel was also ineffective, arguing that the appellate counsel failed to raise “the issue of Petitioner being denied his right to effective assistance of trial counsel” during Petitioner’s

direct appeal. *See* Pet. Mem. at pp. 52, 56. Reiterating the *Strickland* standard for appellate counsel, it is not enough to argue that appellate counsel omitted some arguments, instead it must be shown that such omission was of strong arguments to instead argue weaker ones. *See Clark v. Stinson*, 214 F.3d 315, 322 (2d Cir. 2000). Petitioner's claim lacks any showing that the issues appellate counsel made were substantially weaker than that of ineffective assistance of trial counsel; without such evidence Petitioner's claim towards his appellate counsel must fail. *Cf.* Pet. Mem. at pp. 52–56 (no such argument contained within).

Further, appellate counsel argued that the county court erred in its denial to suppress evidence, in the legal sufficiency of the evidence, the jury charge, and the sentence, among other issues. *See* [REDACTED]. The omission of a singular issue, an issue which this Court finds flawed, is not enough to find that Petitioner's appellate counsel rendered ineffective assistance. Assuming, *arguendo*, that such omission constituted ineffectiveness, no evidence is offered that such issue would have demonstrated "reasonable probability" that this claim would have been successful, nor effect the outcome of Petitioner's appeal; therefore, such claim also fails. *See* Pet. Mem. at p. 56; *see also Claudio v. Scully*, 982 F.2d at 805.

Applicant Details

First Name	Nick
Last Name	Chesrown
Citizenship Status	U. S. Citizen
Email Address	nchesrown@law.gwu.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>4551 Strutfield Ln Apt 4103</div> <div>City</div> <div>Alexandria</div> <div>State/Territory</div> <div>Virginia</div> <div>Zip</div> <div>22311</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	571-329-7350

Applicant Education

BA/BS From	Xavier University
Date of BA/BS	May 2015
JD/LLB From	The George Washington University Law School
	https://www.law.gwu.edu/
Date of JD/LLB	May 19, 2024
Class Rank	25%
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Rienzi, Mark
Rienzi@law.edu
202-319-4970

Perez, Antonio
pereza@cua.edu
7038505764

This applicant has certified that all data entered in this profile and any application documents are true and correct.

NICK CHESROWN

4551 Stratfield Lane Alexandria, VA 22311 | nchesrown@law.gwu.edu | 571-329-7350

June 11, 2023

The Honorable Juan R. Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a law student at The George Washington University Law School and will graduate in May 2024. I am writing to apply for a judicial clerkship with you for the 2024-2025 Term. I am enclosing a resume, law school transcripts, writing sample, and recommendations. The recommendations are from Professors Antonio Perez and Mark Rienzi. Thank you for your consideration.

Sincerely,

Nick Chesrown

NICK CHESROWN

4551 Stratfield Lane Alexandria, VA 22311 | nchesrown@law.gwu.edu | 571-329-7350

EDUCATION

The George Washington University Law School | Washington, D.C.

Juris Doctor GPA: 3.639/4.333

Expected May 2024

Honors: Thurgood Marshall Scholar (top 25% of class)

The Catholic University of America, Columbus School of Law | Washington, D.C.

Juris Doctor (transferred), GPA: 3.645/4.333

August 2021 – May 2022

Honors: Class Rank: 9th out of 114, Dean's List, invited to join the Catholic University Law Review

Xavier University | Cincinnati, OH

Bachelor of Arts, Political Science, *cum laude*

January 2012 – May 2015

Honors: Dean's List (all semesters)

PROFESSIONAL EXPERIENCE

Shearman and Sterling | New York City, NY

Summer Associate

May 2023 – July 2023

- Researched 2nd Circuit case law on FRCP 23(f) petitions including procedural requirements and presented findings
- Drafted memorandum on Michigan attorney-client privilege for privilege determinations for litigation in federal court

Republican National Committee General Counsel Office | Washington, D.C.

Law Clerk

August 2022 – November 2022

- Analyzed election codes and synthesized State Supreme Court holdings into recommendations to support litigation
- Examined D.C. and state law to determine feasibility of challenges on constitutional and other legal grounds
- Evaluated election law claims to determine legal merits and recommended courses of action based on this analysis

New Civil Liberties Alliance | Washington, D.C.

Law Clerk

May 2022 – August 2022

- Researched and drafted legal memoranda for constitutional litigation in federal court on First Amendment, Fourth Amendment, and due process
- Researched administrative record and comments to identify likely clients

The Fund for American Studies Summer Law Fellowship | Washington, D.C.

Legal Fellow

May 2022 – July 2022

- Participated in fellowship with 27 lectures on constitutional law and professional development from scholars and judges

United States Army

Ground Liaison Officer | Kunsan Airbase, Republic of Korea

July 2020 – July 2021

- Synchronized air and ground assets in time and space across Korea by collaborating with Army and Air Force officials

Investigating Officer | Various Locations

May 2016 – September 2019

- Conducted witness interviews for various matters, including sexual harassment cases, destruction of government property, and soldier misconduct
- Analyzed depositions, gathered pertinent evidence, and presented recommendation on charges to commander
- Reviewed Uniform Code of Military Justice to ensure rights of all parties were upheld and consulted with Judge Advocate General during course of investigations

Executive Officer | Fort Hood, TX

March 2019 – September 2019

- Planned and supervised shipment of unit property across United States and Europe ensuring regulatory compliance
- Managed property inventory valued at \$70 million and coordinated monthly inspections to maintain accountability
- Developed annual maintenance plan that forecasted services and replacement parts for a fleet of seventy vehicles

Operations Officer | Fort Hood, TX

September 2018 – March 2019

- Analyzed operational reports and presented findings with recommendations to commander
- Designed annual training plan for battalion of over 500 soldiers, ensuring compliance with regulations

Intelligence Officer | Fort Hood, TX

April 2018 – September 2018

- Analyzed daily reports on threats and world events, then synthesized information into weekly brief to battalion officials
- Created physical, information, and operational security programs and ensured compliance with regulations in preparation for annual inspections

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

OFFICE OF THE REGISTRAR

Gwid : G25163609
Date of Birth: 16-JAN

Date Issued: 05-JUN-2023

Record of: Nicholas T Chesrown II

Page: 1

Student Level: Law
Admit Term: Fall 2022

Issued To: NICHOLAS CHESROWN
NCHESROWN@LAW.GWU.EDU

REFNUM:5598637

Current College(s): Law School
Current Major(s): Law

SUBJ NO COURSE TITLE CRDT GRD PTS

NON-GW HISTORY:

2021-2022 Catholic University of America
LAW 6202 Contracts 3.00 TR
LAW 6206 Torts 4.00 TR
LAW 6208 Property 4.00 TR
LAW 6210 Criminal Law 3.00 TR
LAW 6212 Civil Procedure 3.00 TR
LAW 6214 Constitutional Law I 3.00 TR
LAW 6216 Fundamentals Of Lawyering I 3.00 TR
LAW 6217 Fundamentals Of Lawyering II 2.00 TR
LAW 6700 Civ Pro 3.00 TR
LAW 6700 Contracts 3.00 TR
Transfer Hrs: 31.00
Total Transfer Hrs: 31.00

GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2022

Law School
Law

LAW 6209 Legislation And Regulation 3.00 A
LAW 6230 Evidence 3.00 B+
LAW 6400 Administrative Law 3.00 A-
LAW 6668 Field Placement 4.00 CR
LAW 6671 Government Lawyering 2.00 A
Ehrs 15.00 GPA-Hrs 11.00 GPA 3.727
CUM 15.00 GPA-Hrs 11.00 GPA 3.727
Good Standing
GEORGE WASHINGTON SCHOLAR
TOP 1% - 15% OF THE CLASS TO DATE

Spring 2023

Law School
Law

LAW 6218 Professional Responsibility/Ethic 2.00 B
LAW 6232 Federal Courts 4.00 B+
LAW 6250 Corporations 4.00 A
LAW 6402 Antitrust Law 3.00 A-
Ehrs 13.00 GPA-Hrs 13.00 GPA 3.564
CUM 28.00 GPA-Hrs 24.00 GPA 3.639
Good Standing
THURGOOD MARSHALL SCHOLAR
TOP 16% - 35% OF THE CLASS TO DATE
***** CONTINUED ON NEXT COLUMN *****

SUBJ NO COURSE TITLE CRDT GRD PTS

Fall 2023

LAW 6236 Complex Litigation 3.00 -----
LAW 6380 Constitutional Law II 3.00 -----
LAW 6601 History Of The Common Law 3.00 -----
LAW 6644 Moot Court - Van Vleck 1.00 -----
LAW 6665 Upper-Level Writing 1.00 -----
Credits In Progress: 11.00

***** TRANSCRIPT TOTALS *****
Earned Hrs GPA Hrs Points GPA

TOTAL INSTITUTION 28.00 24.00 87.33 3.639

TOTAL NON-GW HOURS 31.00 0.00 0.00 0.00

OVERALL 59.00 24.00 87.33 3.639

***** END OF DOCUMENT *****



Katie Cloud
Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

NOTICE TO RECIPIENT

Federal legislation (the Family Educational Rights and Privacy Act) requires institutions of higher education to inform each recipient of this academic record that it is to be used only for the purpose for which it was presented and that it is not to be copied or made available to a third party without the express permission of the individual concerned. It must be pointed out in this context that as a general practice, mutually agreed upon by professional associations, such records are not to be reproduced for distribution beyond the purview of the recipient or his/her organization.

DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and

School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit <http://go.gwu.edu/corcorantranscriptkey>

THE CONSORTIUM OF UNIVERSITIES OF
THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-.

Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C- grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; B+, B, B-, Good; C+, C, C-, Passing; D, Minimum Pass; F, Failure; CR, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN, Conditional; W, Withdrawal; X, Exempt, CN/P, Conditional converted to Pass; CN/F, Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the final grade.

For historical information not included in the transcript key, please visit

<http://www.gwu.edu/transcriptkey>

This Academic Transcript from The George Washington University located in Washington, DC is being provided to you by Parchment, Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Parchment, Inc. is acting on behalf of The George Washington University in facilitating the delivery of academic transcripts from The George Washington University to other colleges, universities and third parties.

This secure transcript has been delivered electronically by Parchment, Inc. in a Portable Document Format (PDF) file. Please be aware that this layout may be slightly different in look than The George Washington University's printed/mailed copy, however it will contain the identical academic information. Depending on the school and your capabilities, we also can deliver this file as an XML document or an EDI document. Any questions regarding the validity of the information you are receiving should be directed to: Office of the Registrar, The George Washington University, Tel: (202) 994-4900.



Columbus School of Law

May 16, 2023

Recommendation: Nicholas Chesrown

Your Honor:

I am writing to recommend Nicholas Chesrown for a clerkship in your chambers. I had the pleasure of teaching Nicholas Constitutional Law during his 1L and talking to him about the development of the law outside of class. He will make an excellent law clerk.

As a first-year student in my Constitutional Law I class, Nicholas was well prepared for the classroom discussion. He was a frequent contributor, asking intelligent questions and offering helpful insights. He performed well on both the mid-term and the final exam. He earned an A for the course.

I have also had the pleasure of talking to Nicholas about the development of the law outside of class. When we have seen each other at events, or when we have traded emails since the class was over, Nicholas frequently raises new and interesting questions about whatever is happening in the law or at the Supreme Court. It is obvious to me that he is excited about the law, and continues to think deeply about constitutional law.

On top of all this, Nicholas is also friendly and well-liked by his classmates. He has all the skills, intelligence, and commitment to be an excellent law clerk and a positive addition to any chambers.

I would be happy to talk further about Nicholas's application any time. My cell is 202-507-0834.

Sincerely,

Mark L. Rienzi
Professor of Law

This letter is in support of Mr. Nicholas Chesrown's application to be a judicial clerk. Mr. Chesrown was a student in my Torts class at the Columbus School of Law, at The Catholic University of America, in which he performed admirably both in the final exam for the course and throughout the year. His performance was exceeded in a class of 60 students, comprising half of our day division program, by only one student. I regretted his transfer to Georgetown, since I was confident that he would become one of the leading students in CUA's upper division program, where I would be fortunate to have the opportunity to teach him again; and I was convinced he would become a practicing lawyer who would bring nothing but credit to the school from which he graduates. This judgment was based on decades of experience of assessing law students and following their career success, my own career as a State Department lawyer, my service while an academic as the U.S. representative to the Inter-American Juridical Committee of the Organization of American States, and my interaction with other elite lawyers, both scholars and practitioners, while serving on the U.S. State Department's Advisory Committee on Private International Law. Mr. Chesrown easily exhibits the attributes of intellect, character, and diligence that are necessary to function at the highest levels of our profession.

Let me refer to some examples of his in-class performance that distinguished him from his fellow classmates. Unlike most students, who at the beginning of their education focus on individual cases, Mr. Chesrown immediately evidenced the ability to abstract, leading the class into an inquiry of how various cases evidencing apparent deviations in the application of the reasonable person standard – ranging from age, infirmities, and other circumstances – could be unified and then distinguished along various parameters. As the semester progressed, he showed intellectual courage in being willing without the slightest provocation from the teacher to argue against majority doctrine, most notably in defending the so-called “coming to the nuisance” exception to a nuisance claim, which resulted in civil, albeit raucous, class debate about the priority to time and social value in the indirect allocation of property rights by means determining tort claims. A mind like Mr. Chesrown's allows a tort teacher to prepare the way for property teachers, at least in the course sequence we have at CUA. As such, he is of inestimable value in the classroom. By the end of the semester, he was abstracting across doctrinal categories, evidencing a deeper ability to look for regularities across tort theory generally. In the context of our analysis of privacy torts during the end of the semester, in discussing *Galella v. Onassis*, he crafted an innovative argument analogizing to public nuisance doctrine and thus differentiating Ms. Onassis and Mr. Galella's interests in public spaces from the ordinary interests of the general public in access to the public ways, allowing him to differentiate the facts from ordinary cases better than what was possible under the common understanding of the opinion.

I could go on. But you get the point. I can't put a ceiling on what he can accomplish, and it would be a privilege for me to help him along his way in the future. Hence, I believe he is a truly worthy candidate for a clerkship and that, like me, you will consider yourself privileged to have had the opportunity to mentor him. If you have any questions, do not hesitate to contact me (pereza@cua.edu or 703-850-5764).

Sincerely,

Antonio F. Perez
Professor of Law

NICK CHESROWN

4551 Stratfield Lane Alexandria, VA 22311 | nchesrown@law.gwu.edu | 571-329-7350

Writing Sample

The below writing sample is a ten-page appellate brief that I wrote for my 1L legal writing class. This litigation concerned the False Claims Act and was filed in the United States Federal District Court of Kansas, where summary judgement was granted for the defendant. The plaintiff appealed to the Tenth Circuit. I represented the defendant-appellee and wrote this brief requesting that the Court uphold the District Court's summary judgment.

JURISDICTIONAL STATEMENT

The United States Federal District Court of Kansas had original and subject matter jurisdiction under 28 U.S.C. § 1331 (2018) based on allegations of filing false Medicare reimbursement claims arising out of the False Claims Act (“FCA”) 31 U.S.C. § 3729 (2011). This Court has jurisdiction under 28 U.S.C. § 1291 (2018) because Grace Garrett (“Garrett”) filed a timely appeal on February 18, 2022. Twin Oaks filed a timely cross-appeal on February 19, 2022, from portions of the order dated February 15, 2022.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Whether the public disclosure jurisdictional bar was met when allegations substantially similar to Garrett’s claim, were published by state news outlets.
- II. Whether Garrett qualifies under the original source exception to the jurisdictional bar when she gained the knowledge for her claim from coworkers and Candidate Chamberlin’s speech, and she failed to voluntarily disclose the information to the government, as required by law.

STATEMENT OF THE CASE

Garrett appeals a decision of the Federal District Court of Kansas granting summary judgment in her False Claims Act (“FCA”) claim against Twin Oaks. Twin Oaks seeks affirmation of the District Court’s grant of summary judgment in favor of Twin Oaks. Garrett filed her complaint on September 1, 2021. Twin Oaks filed its motion for summary judgment on January 11, 2022. By order dated February 15, 2022, the District Court granted summary judgment in favor of Twin Oaks. Garrett filed a notice of appeal on, February 18, 2022, and Twin Oaks filed a brief in opposition on, February 19, 2022.

Twin Oaks is a hospital that is well regarded in the community and known for its excellence in elder care. Garrett was briefly employed as a Medical Records Specialist at Twin Oaks. Last year, an outbreak of severe pneumococcal pneumonia occurred at a local elder care facility known as River Crest Community Center (“River Crest”). The residents of River Crest frequently come to Twin Oaks for healthcare services. This pneumonia outbreak was no different. Twin Oaks provided dedicated and personal care to all residents that were suffering from the infection.

Through workplace gossip, Garrett learned there was confusion over pneumonia coding procedures. Garrett decided to conduct her own unsanctioned investigation. At a staff meeting on June 3rd, Garrett alerted her superiors to a perceived coding error. Present at the meeting with Garrett, was the Records Supervisor Charles McRaney (“McRaney”), and the Hospital Administrator, Rosemary Rinehart (“Rinehart”). Following Garrett’s notification, Rinehart told McRaney to investigate the matter. McRaney contacted Twin Oak’s Medicare representative Lesley Ross (“Ross”) on June 10th. On June 15th McRaney received Ross’ reply. Exhibit P shows that Ross told McRaney that, “[f]or the time being – and this is a provisional statement only – you can consider the code on the matters in question for severe pneumococcal pneumonia as proper.” McRaney delegated a response to his subordinate and no further communications were received from Ross. Twin Oaks continued its pneumonia coding practices, in accordance with established hospital procedures, and with the assurance from Ross that unless they heard otherwise, everything was proper.

During this time, Garrett was volunteering on the campaign of a candidate for the House of Representatives, Franklin Chamberlin (“Chamberlin”). Garrett volunteered on the media committee, where she prepared the press release for an event on July 25th at River Crest.

Chamberlin gave a speech highlighting the Medicare issue facing residents at River Crest. At this press event, Chamberlin detailed the underlying facts of Garrett's claim.

Garrett persisted in her unsanctioned investigation, and on July 28th, Garrett attempted to make a call to the Medicare fraud tip line. She mistakenly reached the home of an investigator at the Department of Health and Human Services' Office of the Inspector General. Where she left a voicemail, however Garrett failed to identify herself. On July 30th, Garrett filed her complaint against Twin Oaks.

SUMMARY OF THE ARGUMENT

This brief begins by citing the standard of review for summary judgment, elements of a successful claim under the FCA, and the purpose of the FCA. Next, the facts of Garrett's claim are analyzed and the FCA is applied demonstrating that Garrett's claim fails in two respects. First, Garrett's allegations were based upon publicly disclosed information, which is barred by the FCA. Second, Garrett fails to qualify for the original source exception to the publicly disclosed information bar, because her knowledge was neither independent of nor materially added to the public information. Therefore, the dismissal of Garrett's claim by the District Court should be upheld on the basis that Garrett's claim barred by public disclosure and Garrett failed to qualify for the original source exception.

ARGUMENT

This Court Reviews Grant of Summary Judgment De Novo.

This Court reviews a grant for summary judgment de novo. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009). Summary judgment is appropriate in this case due to the lack of material facts at issue. Summary Judgment is only appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact.” *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187, 1192 (10th Cir. 2002). This Court has defined a material fact as follows: “[a]n issue of fact is material if under the substantive law it is essential to the proper disposition of the claim.” *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). When interpreting the facts for “summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Ultimately, Garrett, as the party asserting the claim, bears the burden of proof. *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1048 (10th Cir. 2004). However, Garrett makes allegations but fails to establish a genuine issue of material facts. The facts of this case, when viewed in the light most favorable to Garrett show an individual who took workplace gossip and constructed an, at best, misguided allegation against a respected healthcare provider. According to the standards cited above, this Court should affirm the summary judgment of the District Court.

For a complaint to fall under the authority of the FCA, “a person or organization must (1) knowingly present, or cause to be presented, and (2) it must be a false or fraudulent claim for payment or approval.” 31 U.S.C. § 3729(a)(1)(A) (2011). The purpose of the FCA is to impose, “significant penalties on anyone who knowingly presents . . . a false or fraudulent claim.” *Universal Health Servs., Inc. v. U.S.*, 579 U.S. 176, 176 (2016). The FCA exists to punish fraud perpetrated against the government. Since the law’s initial creation during the Civil War Congress has passed successive laws strengthening and adapting the FCA to modern times. In 1986, Congress enacted 31 U.S.C. § 3730; this addition included a public disclosure bar where information that was known to the public prevented a private citizen from suing. Congress enacted this jurisdictional bar to prevent opportunistic litigation. An application of this bar

occurred in *Schindler Elevator Corp.*, where the Supreme Court stated, “[this was] a classic example of the opportunistic litigation that the public disclosure bar is designed to discourage.” *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 413 (2011). Similar to *Schindler Elevator Corp.* Garrett based a FCA claim on information that was public knowledge because the information for the claim was sourced from Chamberlin’s speech and the subsequent press releases. Therefore, Garrett’s claims are opportunistic in nature and qualify for the jurisdictional bar.

I. This Court Should Affirm that the Allegations in Garrett’s Claim were Publicly Disclosed Because Substantially Similar Allegations were Published by State Media.

Garrett’s claim fails to clear the public disclosure jurisdictional bar as established in 28 U.S.C. § 3730. The test to determine whether the jurisdictional bar applies to a case has four requirements. The requirements are as follows,

(1) whether the alleged public disclosure contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made public within the meaning of the False Claims Act; (3) whether the relator’s complaint is based upon this public disclosure; and, if so, (4) whether the relator qualifies as an original source

U.S. ex rel. Bahrani v. Conagra, Inc., 465 F.3d 1189, 1207 (10th Cir. 2006). Requirements one through three determine if the jurisdictional bar has been met. In this case, Twin Oaks can demonstrate the public disclosure bar was triggered because Chamberlin’s speech contained substantially similar allegations as compared to Garrett’s claim. Requirement four is an exception to the public disclosure bar and is analyzed in Section II.

A. State News Agencies Published the Allegations thus Meeting the Qualifying Source Standard Under the Statute.

Only certain sources meet the threshold to qualify as public disclosure. The statute lists information originating from the following sources as qualifying, “(1) in a criminal, civil, or

administrative hearing, (2) in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or (3) from the news media.” 31 U.S.C. § 3730(e)(4)(A) (2010). When determining the limits of what qualifies as a source for public disclosure the United States Supreme Court has stated, “sources of public disclosure in § 3730(e)(4)(A), especially news media, suggest that the public disclosure bar provides a broad sweep.” *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 408 (2011). Thus, establishing the public disclosure bar has broad limits for the types of disclosure that qualify. In Garrett’s case, state news organizations published Chamberlin’s speech. Because news media is a qualifying source for public disclosure, Garrett’s claim meets the first element of the jurisdictional bar.

B. The Disclosure was Made Public Within the Meaning of the False Claims Act Because it Originated from an Approved Source.

This Court has determined that for a disclosure to qualify as public it only needs publication from an approved source. This Court stated in *Kennard* that once a qualifying source publishes information, it has been made public, and this Court further elucidated, “[t]here is no requirement that a certain number of people read or receive the information.” *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004). To meet the second requirement, all that is necessary is to show a source qualifying under the first requirement published the information. Because various state news agencies published the information that Garrett used for her claim the second element for a jurisdictional bar is met.

C. Garrett’s Complaint is Based on the Publicly Disclosed Information from Chamberlin’s Speech.

To determine if the third requirement is met the allegations of the complaint and the publicly disclosed information must be analyzed to determine if there are any similarities.

Specifically, “[t]he test is whether substantial identity exists between the publicly disclosed allegations and the qui tam complaint.” *Id.* The publicly disclosed allegations originate from Chamberlin’s speech. The focus of this speech was allegedly wrongful Medicare charges for residents of Rivercrest Retirement Community. Garrett’s claims concern the Medicare coding practices for these very same residents. In fact, Mr. Robinson, one of the named residents in Garrett’s complaint, was specifically mentioned in Chamberlin’s speech. Because of the substantial identity between Garrett’s complaint and the public allegations from Chamberlin’s speech, the third element of public disclosure is met. Therefore, this Court should affirm the District Court’s application of the public disclosure jurisdictional bar for Garrett’s claim.

II. This Court Should Affirm the District Court’s Holding that Garrett Failed to Qualify as an Original Source Because Garrett does not have Independent Knowledge and She Failed to Voluntarily Provide Information to the Government Prior to Filing the Claim.

Garrett does not qualify as the original source exception to the public disclosure jurisdictional bar. An original source is defined as having, “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing.” 31 U.S.C.A. § 3730(e)(4)(B) (2010). To qualify as original, a source must prove both that the claim is based on knowledge independent of the public disclosure and materially adds to the public disclosure. Finally, an independent source must voluntarily provide this information to the government. Garrett’s information in the claim is neither independent nor does it materially add to public information and Garrett failed to notify the government prior to filing the claim.

A. Garrett’s Knowledge is Neither Independent Nor does it Materially Add to the Publicly Disclosed Information.

The first requirement of the original source exception has two sub-elements. Sub-element one requires a determination of whether the source possesses independent knowledge. Independent knowledge is achieved by the marked, “absence of an intervening agency . . . [and] unmediated by anything but the relator's own labor” *U.S. ex rel Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 799 (10th Cir. 2002). Garrett fails this sub-element since the knowledge used for the allegations in the complaint came from workplace gossip and Chamberlin’s speech. These facts demonstrate that Garrett’s knowledge is owed to the intervening actions of coworkers and Chamberlin. Although Garrett conducted an unsanctioned investigation into the allegations in the complaint, it was far from unmediated because no research would have occurred without the initiating events of others.

Even if one believes Garrett possessed independent knowledge the complaint still fails on the second sub-element. Which requires that the independent knowledge materially add to the public information. Information that materially adds to public information is of, “a nature that knowledge of the item would affect a person's decision-making, or if it is significant, or if it is essential.” *U.S. ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 756 (10th Cir. 2019). To meet this requirement for the original source exception a source must introduce facts that absent their presence a claim would fail. The material elements of Garrett’s claim were already known due to Chamberlin’s press conference. Namely, that residents of Rivercrest were experiencing Medicare overcharges for routine care, by Twin Oaks. Garrett’s additions do not distinguish her claim from the public information. Garrett’s claim merely named the additional residents that Chamberlin had referred to as a class, and new information of Twin Oaks activity merely shows that Twin Oaks followed proper hospital and Medicare protocol when the matter was first raised. Due to the similarities, and failure to materially add to the public information, Garrett’s claim fails the

second sub-element. Because Garrett does not possess independent knowledge nor materially add to the public information, Garrett fails the first element of the original source exception.

B. Garrett Failed to Voluntarily Provide Information about the Claim to the Government Prior to Filing the Complaint.

Even if one accepts that Garrett meets the first requirement, Garrett still does not qualify as an original source. This is because the second requirement for an original source requires Garrett to voluntarily provide the information in the complaint to the government prior to filing. Courts have, “not settled on what it means to have voluntarily provided the information to the Government before filing an action.” *In re Nat. Gas Royalties*, 562 F.3d 1032, 1043 (10th Cir. 2009). However, looking at the purpose behind voluntary disclosure and the consequence of its absence helps create a rule to apply. The purpose behind this requirement necessitates that, “[i]f a relator does not voluntarily provide such information to the government, however, the purposes of the FCA weigh against allowing him to bring a *qui tam* action.” *Id.* at 1044. Additionally, when a plaintiff fails to voluntarily disclose specific information to the government a consequence is, “he should not be allowed to later rely upon it to establish his status as an original source” *See Id.* So, even if a realtor meets the requirements for element one of an original source, a failure to voluntarily provide this information to the government prior to filing a complaint prevents using that same information for consideration of the original source exception.

Garrett attempts to get around this failure by relying on an attempt to contact the Medicare fraud tip line. However, an attempt at an act is different from accomplishing the act. Additionally, her call was not to the official fraud tip line but the residential number of a Medicare fraud investigator. On the call Garrett did not speak with the investigator. Instead,

Garrett left a voicemail, where only the generalities of the complaint were mentioned. Additionally, Garrett did not identify herself by name or as even as an anonymous former employee of Twin Oaks. These facts may support an argument that Garrett attempted to disclose, but the statute requires actual disclosure. An attempt is not enough. Due to Garrett's lack of voluntary disclosure Garrett fails the second original source element. Because Garrett failed to meet both elements of the original source exception Garrett does not clear the public disclosure jurisdictional bar. Therefore, this Court should affirm the District Court's holding that Garrett does not qualify for the original source exception to the jurisdictional bar.

CONCLUSION

For all the foregoing reasons, Twin Oaks respectfully requests that this Court affirm the District Court's summary judgment by application of the public disclosure jurisdictional bar and uphold the District Court's ruling that Garrett does not qualify as an original source.

Applicant Details

First Name **Jacob**
 Middle Initial **W**
 Last Name **Ciafone**
 Citizenship Status **U. S. Citizen**
 Email Address jwc2172@columbia.edu

Address	Address Street 240 E 27th St. Apt. 2B City New York State/Territory New York Zip 10016 Country United States
---------	---

Contact Phone Number **3039951285**

Applicant Education

BA/BS From **Boston College**
 Date of BA/BS **May 2018**
 JD/LLB From **Columbia University School of Law**
<http://www.law.columbia.edu>
 Date of JD/LLB **May 15, 2023**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Columbia Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Native American Law Students Moot Court (participant)**
Foundations Moot Court (editor)

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Liebman, James S.
jliebman@law.columbia.edu
212-854-3423

Gerrard, Michael
michael.gerrard@law.columbia.edu
212-854-3287

Andrias, Kate
kandrias@law.columbia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JACOB W. CIAFONE
420 E 27th St.
New York, NY 10016
(303) 995-1285
jwc2172@columbia.edu

June 11, 2023

The Honorable Juan Sánchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez,

I am 2023 graduate of Columbia Law School and an incoming litigation associate at Sullivan & Cromwell. During my time at Columbia, I served as a managing editor on the *Columbia Law Review*, and was a James Kent and Harlan Fisk Stone Scholar. I write to apply for a clerkship in your chambers beginning in 2024 or any year thereafter.

Ever since participating in 1L moot court, I knew that I wanted to pursue a career in litigation. I have made progress towards that goal as an intern at the United States Attorney's Office for the District of Colorado, and as a summer associate at Sullivan & Cromwell. My experience externing at the Southern District of New York showed me first hand how much can be learned from a clerkship. I hope that as a clerk in your chambers, I will be able to further the work of the court while developing litigation skills.

Enclosed please find my resume, transcript, and writing sample. I have also attached letters of recommendation from Professors Kate Andrias (212-854-5877, kandrias@law.columbia.edu); James Liebman (212-854-3423, jliebman@law.columbia.edu); and Michael Gerrard (212-854-3287, mgerra@law.columbia.edu).

Thank you very much for your consideration. Please let me know if I can supply any additional information.

Sincerely,

Jacob W. Ciafone

JACOB W. CIAFONE

240 E 27th St., Apt. 2B, New York, NY 10016 • jwc2172@columbia.edu • (303) 995-1285

EDUCATION

Columbia Law School, New York, NY

J.D., received May 2023

Honors: James Kent Scholar (1L, 3L), Harlan Fiske Stone Scholar (2L)

Awards: Best in Class (Environmental Law, Fall 2022)

Activities: *Columbia Law Review*, Managing Editor
Foundation Moot Court Program, Editor
Native American Law Students Moot Court

Boston College, Boston, MA

B.A., *summa cum laude*, in linguistics and German, received May 2018

Minor: Chinese

Honors: Gabelli Presidential Scholarship (Full-tuition merit scholarship)
Phi Beta Kappa

Study Abroad: Universität Heidelberg, Germany (Fall 2017)
Harvard Beijing Academy, China (Summer 2016)

EXPERIENCE

Sullivan & Cromwell, LLP, New York, NY

Junior Associate (offer accepted)

Starting 09/2023

Hon. Jesse M. Furman, U.S. District Court for the Southern District of New York, New York, NY

Extern

1/2022-Present

Researched and drafted opinions and memoranda for pending cases

Sullivan & Cromwell, LLP, New York, NY

Summer Associate

5/2022-7/2022

Completed legal research and writing assignments in the litigation department.

United States Attorney's Office for the District of Colorado, Denver, CO

Summer Intern

5/2021-7/2021

Drafted motions and memoranda in the criminal and civil divisions in preparation for litigation.

FareHarbor Holdings, Denver, CO

Customer Support Analyst

1/2020-7/2020

Provided clients with expert product support to facilitate online booking. Worked directly with clients over phone and email to help tailor reservation software to their needs.

Fulbright Research Grant, Berlin, Germany

Research Fellow

9/2018-7/2019

Designed and completed a research project on German colonialism in China. Took graduate courses on Chinese politics and Mandarin Chinese. Organized a homestay with a German family for the duration of the grant.

LANGUAGES: German (Advanced), Mandarin Chinese (Intermediate)

ACTIVITIES: Marathon running



Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/25/2023 10:26:09

Program: Juris Doctor

Jacob Walter Ciafone

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6231-2	Corporations	Talley, Eric	4.0	A
L6661-1	Ex. Federal Court Clerk - SDNY	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR
L6274-3	Professional Responsibility	Fox, Michael Louis	2.0	A
L8451-1	S. Advanced Climate Change Law [Minor Writing Credit - Earned]	Gerrard, Michael	2.0	A
L6822-1	Teaching Fellows	Liebman, James S.	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6422-1	Conflict of Laws	Monaghan, Henry Paul	3.0	A-
L6242-1	Environmental Law	Gerrard, Michael	3.0	A+
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L8253-1	S. Congressional Oversight - Past, Present, & Future	Lowell, Abbe D.	2.0	A-
L8423-1	S. Law Journal Management	Canick, Simon	1.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A
L6241-1	Evidence	Capra, Daniel	4.0	A-
L6473-1	Labor Law	Andrias, Kate	4.0	A-
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6822-1	Teaching Fellows	Bernhardt, Sophia	1.0	CR
L6822-2	Teaching Fellows	Godsoe, Cynthia	2.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6796-1	Ex. Civil Litigation: Employment	Cacace, Karen; Clarke, Jessica	2.0	A-
L6796-2	Ex. Civil Litigation: Employment - Fieldwork	Cacace, Karen; Clarke, Jessica	3.0	CR
L6169-1	Legislation and Regulation	Briffault, Richard	4.0	A-
L6675-1	Major Writing Credit	Andrias, Kate	0.0	CR
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L6685-1	Serv-Unpaid Faculty Research Assistant	Liebman, James S.	1.0	CR
L6683-1	Supervised Research Paper	Andrias, Kate	2.0	CR
L6674-1	Workshop in Briefcraft	Bernhardt, Sophia	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6105-1	Contracts	Scott, Robert	4.0	A-
L6108-3	Criminal Law	Liebman, James S.	3.0	A
L6327-1	Employment Law	Barenberg, Mark	4.0	A
L6130-5	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR
L6121-30	Legal Practice Workshop II	Kintz, JoAnn Lynn	1.0	P
L6873-1	Nalsa Moot Court	Kintz, JoAnn Lynn; Strauss, Ilene	0.0	CR
L6116-3	Property	Glass, Maeve	4.0	A-

Total Registered Points: 17.0

Total Earned Points: 17.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-1	Civil Procedure	Lynch, Gerard E.	4.0	A-
L6133-4	Constitutional Law	Purdy, Jedediah S.	4.0	B+
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-12	Legal Practice Workshop I	Dodge, Joel; Neacsu, Dana	2.0	P
L6118-1	Torts	Blasi, Vincent	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 89.0

Total Earned JD Program Points: 89.0

Best In Class Awards

Semester	Course ID	Course Name
Fall 2022	L6242-1	Environmental Law

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	3L
2021-22	Harlan Fiske Stone	2L
2020-21	James Kent Scholar	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	31.0

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in strong support of Jacob Ciafone's application for a clerkship.

Jacob first came to my attention as an active participant in classroom discussions in my Criminal Law course in the spring semester of his 1L year. I encourage and grade students on their participation in class, and Jacob's frequent volunteered remarks were analytically acute, on point, and revealed his thorough preparation for each class.

Jacob's performance on the final examination confirmed my high regard for his command of the materials and his analytic skills—the latter illustrated by his ability to reason his way through some of the most intricate aspects of a difficult issue-spotting exam. On the final, policy question on the exam, Jacob produced a cogent and well-organized, -written, and -reasoned essay under time pressure, which exhibited good judgment in addressing a number of philosophical debates encountered during the semester. Overall, Jacob excelled on all dimensions of the course that I assess during the semester and on the exam.

Based on Jacob's terrific performance in the course, I asked him to serve as a Criminal Law Teaching Assistant—recommending him to the professor who covered my class during a partial leave the following year and convincing him to serve as my Criminal Law TA in the semester that just ended. His support for individual students, his periodic review sessions for all students covering material I had gone through the preceding few weeks, and his advice to me about ways to improve the course were exemplary and contributed substantially to the success of my most recent semester of Criminal Law in which I substantially reorganized the course.

In the Fall of Jacob's 2L year, Jacob served as my Research Assistant on a forthcoming article on ways of restructuring of the nation's public education systems. This work gave me a fuller view of Jacob's research and writing skills. As a researcher, Jacob was creative and intellectually curious, following up on my general suggestions about matters I was interested in with a thorough review of materials he discovered on the topic and with strong and interesting analysis of what could be learned from the materials he found. His memos were clear and well-written and enabled me easily to distill the information he had discovered into relevant passages in the article.

In his other work at the Law School, Jacob has looked for other opportunities to improve his research and writing skills with an eye towards the litigation career he aims to pursue. As a 2L editor for Columbia's Foundation Moot Court program, he wrote the legal problem that served as the prompt for the Law School's 1L brief-writing competition and a bench memo to guide competition judges during oral argument. His externship this past semester in the chambers of Judge Jesse Furman of the Southern District of New York gave him experience with the research and writing that goes into judicial decisionmaking.

Jacob's work this past semester seamlessly TA'ing for me, externing with Judge Furman, serving as managing editor of the *Columbia Law Review*, and (I expect) maintaining his consistently A-level grades reveal a facility for working hard, well, and efficiently under time pressure. His interactions with his Criminal Law student colleagues and advisees and with my other RAs and TAs make clear, as well, that he is a well-liked team player who prioritizes the needs of the collective endeavor at hand.

I am confident that Jacob will make an excellent law clerk, and I strongly recommend him for that position. Please let me know if I can provide any additional information.

Sincerely,

James S. Liebman

James S. Liebman - jliebman@law.columbia.edu - 212-854-3423

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Your Honor:

I am pleased to submit this recommendation for Joseph Ciafone for a clerkship in your chambers.

In the fall semester of 2022, Joseph took my Environmental Law course. He wrote the best final exam in the class and earned an A+. I distributed his exam afterwards to the class as an exemplar of good legal writing and analysis.

Joseph is currently taking my Advanced Seminar in Climate Change Law. He is an active and constructive participant in class discussions.

Joseph is a Managing Editor of the Columbia Law Review. Obtaining this position is very challenging, and carrying it out is even more. From everything I have seen, he's doing a terrific job there.

For the reasons given above, I am happy to recommend Joseph for a clerkship in your chambers.

Sincerely,

Michael B. Gerrard
Andrew Sabin Professor of Professional Practice
Director, Sabin Center for Climate Change Law
Columbia Law School

Michael Gerrard - michael.gerrard@law.columbia.edu - 212-854-3287

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing with great enthusiasm to recommend Jacob Ciafone for a clerkship. I believe he would make a terrific addition to any chambers. I taught Jacob in Labor Law during the Spring 2022 term. He was a stellar student, consistently prepared and engaged in class discussion. During cold-calls, he analyzed doctrine accurately and with insight, noticing complications and connections that escaped many students. His exam demonstrated comprehensive understanding of the topics covered in class, including the scope of protection for employee concerted action, related problems of constitutional law and statutory interpretation, and difficult issues of federal preemption. His writing was particularly strong for a time-pressured exam.

I also supervised Jacob's major writing credit, during which he wrote a paper about the joint-employment doctrine under the National Labor Relations Act. He looked at how major franchises like McDonalds control nearly every aspect of the work environment but are shielded from having to confront collective bargaining because of the legal separation of franchisor and franchisee. He argued that the Board should return to the joint-employment standard of Browning-Ferris, which allows reserved control, rather than actually exercised control, to be the touchstone of the analysis. His paper was well argued and engaged a range of doctrine including labor, antitrust, trademark, and administrative law.

Jacob has excelled at Columbia Law School outside of the classroom as well. He has served as the managing editor of the Columbia Law Review, where he took the lead on technical edits, formatting, mentoring staff editors, and making sure the law review published on time and maintained its excellent quality. He did a terrific job in that capacity.

I know from conversations with Jacob that he hopes to pursue a career in litigation. He spent his second summer at Sullivan and Cromwell and plans to return there as a litigation associate upon graduation. He has also sharpened his writing and research skills while working as an extern in Judge Jesse Furman's chambers on the Southern District of New York.

Finally, Jacob is truly a pleasure to work with. He is timely, thorough, and collegial. He has wide ranging interests, including travel, foreign language acquisition (Chinese and German), and marathon running.

I have no doubt that Jacob will excel as a clerk, given his superior writing, reasoning, and oral advocacy skills, as well as his ability to manage complicated projects and meet competing deadlines. I hope you consider his application. I would be happy to answer any questions you might have and can be reached on my cell phone at 202-714-9288.

Sincerely,

Kate Andrias

Kate Andrias - kandrias@law.columbia.edu

JACOB W. CIAFONE
Columbia Law School J.D. '23
(303) 995-1285
jwc2172@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is based on a memorandum that I wrote as an extern in the chambers of the Hon. Jesse M. Furman of the Southern District of New York. The memorandum advises the court on how to dispose of a motion to dismiss filed in a discrimination case. The case concerns a government worker's allegations of disability discrimination against his federal employer. To protect confidentiality, I have changed the names of the parties and altered several facts and dates. Judge Furman has given me permission to use this work product as a writing sample for clerkship applications.

This memorandum concerns the disposition of a motion to dismiss in *Clark v. Wheeler*. The case arises out of a dispute over the Environmental Protection Administration’s (“EPA”) COVID-19 policies. Plaintiff Timothy Clark has sued EPA Administrator Andrew R. Wheeler as well as the Regional Administrator Region 2 Office in New York, Susan Waverly, and his direct supervisor Dylan O’Connor (collectively, “Defendants”). Plaintiff alleges that Defendants violated his rights under the Rehabilitation Act, the Americans with Disabilities Act (“ADA”), New York State Human Rights Law (“NYSHRL”), and New York City Human Rights Law (“NYCHRL”) by denying his application for a reasonable accommodation, retaliating against him for seeking an accommodation, and denying him sick leave. For the reasons that follow, that motion should be granted in part and denied in part.

Background

The following facts are taken from the Complaint and assumed to be true for the purposes of this motion. Plaintiff has worked as a Public Relations Specialist at EPA’s Region 2 Office (“the Region”) in New York City since 2014. ECF No. 5 (“Compl.”) ¶ 3. As a Public Relations Specialist, Plaintiff manages the Region’s web presence. He posts articles about the EPA’s activities in New York State and makes occasional site visits to take photographs and interview agency officials. *Id.* ¶ 4.

In response to the outbreak of COVID-19, the EPA announced a nation-wide maximum telework policy in March of 2020. *Id.* ¶ 4. That policy required the Plaintiff—and most other employees—to work remotely. *Id.* ¶ 5. As caseloads subsided in September of that year, the Region’s instituted a staggered return-to-office plan that would allow for social distancing. Pursuant to the plan, each employee would report for in-person work two days a week. *Id.*

Mr. Clark did not want to return to the office. He has several health conditions which make him susceptible to severe complications from COVID-19 and feared that in-person work would put him at risk of serious illness. *Id.* ¶¶ 8, 13. Additionally, he claimed that the return-to-office plan set by Region violated the maximum-telework policy, which had been promulgated at the national level and had not been officially withdrawn. *Id.* ¶ 5. Mr. Clark voiced these concerns to his union representative. *Id.*

The union arranged for Mr. Clark to receive an additional two weeks of remote work. *Id.* When the extension lapsed, the Mr. Clark again raised concerns about returning to the office. *Id.* ¶ 6. This time, the union organized a meeting between the Mr. Clark, his supervisor Dylan O'Connor, and a human resources representative. *Id.* ¶¶ 5-6. On the advice of H.R., Mr. Clark decided to apply for a reasonable accommodation that would allow him to continue working remotely. *Id.* at 6. Management agreed to extend Mr. Clark's initial two-week extension through November 10, 2020 to allow the him to collect the medical documentation for his accommodation request. *Id.* ¶¶ 6-7. During that period, Mr. Clark's doctor diagnosed him with several autoimmune conditions. *Id.* ¶ 8. After the telework extension lapsed, Plaintiff requested and was denied several days of additional sick leave to finalize his reasonable accommodation request. The Plaintiff filed an accommodation request with supporting documentation from his doctor, but it was rejected. *Id.* ¶¶ 8-9.

Mr. Clark again contacted his union. The union submitted the first of three grievances on November 20, 2020. It complained that the Region had violated its own safety policies by, *inter alia*, failing to provide employees with masks and sanitation materials and by its nonenforcement of social distancing. *Id.* ¶ 9. In the meantime, the Plaintiff resumed in-person work two days a week. *Id.* Soon thereafter, Mr. O'Connor assigned him to photograph several events, which would

require travel to sites in the Hudson Valley. *Id.* ¶¶ 9-10. Mr. Clark, who does not drive, explained that using public transportation or a rideshare would put him at risk of contracting COVID-19. *Id.* ¶ 10. Moreover, he questioned whether the assignment was retaliation for filing a union grievance, noting that in the past, whether to take field trips had been left up to his “professional discretion.” *Id.* ¶ 12.

Mr. Clark again turned to the union. On December 8, 2020, the union filed a second grievance. *Id.* ¶ 11. This grievance argued that he had been assigned to field trips in retaliation for requesting a reasonable accommodation.. *Id.* ¶ 11. Several days later, the union submitted a final grievance, which argued that Mr. Clark’s reasonable accommodation request had been improperly denied. *Id.* ¶¶ 11-12. Mr. Clark pursued these grievances on a consolidated basis through the multistep dispute-resolution procedure outlined in his collective bargaining agreement (“CBA”). *Id.* ¶ 15. After mediation failed to resolve the dispute, *Id.* ¶¶ 20-21, Mr. Clark submitted the matter to arbitration in April of 2021. *Id.* ¶ 23.

While his union grievances were pending, Mr. Clark filed a formal complaint with the Region’s EEO officer in January of 2021. *Id.* ¶ 16. The complaint alleged that the Region had had discriminated against the Plaintiff on the basis of a disability when it (1) denied his accommodation request for telework and (2) when it denied his post-grievance requests for sick leave. *Id.* ¶ 17. After meeting with the Plaintiff, the EEO office issued a letter of investigation in March of 2021. *Id.* ¶ 17. The letter advised that the EEO would investigate the denial of sick leave but would dismiss the complaint about the denial of a reasonable accommodation because the plaintiff had opted to address these complaints through the negotiated grievance process. *Id.*

Meanwhile, Mr. Clark’s relationship with Region management remained fraught. In March, his supervisor criticized several of his articles as unsatisfactory although they were, in Plaintiff’s

view, no different in quality from his previous work. *Id.* ¶ 17. Later, his supervisor confronted him about tardiness in posting website updates. *Id.* Mr. Clark maintained that the delay had been due technological issues. *Id.* On top of negative feedback, Mr. Clark alleges that his supervisor held him to unreasonable standards. Specifically, he gave the Plaintiff one week to compose four articles and make a field visit. *Id.* ¶ 18. Mr. Clark protested that no Public Relations Specialist had ever been required to write multiple articles in a single week, let alone do so while also obligated to make a time-intensive field trip. *Id.*

Similar incidents occurred through April. *Id.* ¶ 21. That May, the Plaintiff received a rating of “3 (fully successful)” during his annual review. *Id.* ¶ 22. This marked the first time the Plaintiff received a rating less than “5 (Outstanding)” in his twenty years of employment with the Corps. *Id.* The reduction in rating carries implications for the Plaintiff’s annual bonus and competitiveness for future jobs with the federal government. *Id.* ¶ 23. Conflict at work caused the Plaintiff enough mental distress that he sought out mental health counseling. *Id.* ¶ 45. The Plaintiff concludes that this was an attempt to “harass, humiliate and intimidate” him. *Id.* ¶ 24.

Legal Standard

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept “all factual allegations as true and draw[] all reasonable inferences in favor of the plaintiff.” *Trustees of Upstate N.Y. Engineers Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). To survive a motion to dismiss, a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face ‘when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On the other hand, the Court will not “credit conclusory allegations or

legal conclusions couched as factual allegations.” *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013). Thus, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

Discussion

The Government contends that the entirety of Mr. Clark’s complaint should be dismissed for failure to state a claim on which relief can be granted. Its motion to dismiss rest on two arguments. First, since claims of disability discrimination can only be brought against the federal government under the Rehabilitation Act, all theories of liability under other statutes must be dismissed. Second, because Mr. Clark failed to exhaust his administrative remedies, he is barred from bringing suit at this time. For the reasons that follow, the Court should grant the Government’s motion in part and deny it in part.

A. The Rehabilitation Act Is the Sole Cause of Action for Disability Discrimination Against the Federal Government and the Agency Head Is the Proper Defendant

The Government’s first argument for dismissal is that Mr. Clark has brought claims under the wrong statutes and named improper defendants. Plaintiff claims that the Region—a subdivision of a federal agency—unlawfully discriminated against him on the basis of a disability under the Rehabilitation Act, the ADA, NYSHRL, and NYCHRL. The Government argues that since a disability discrimination suit against a federal agency can only be maintained under the Rehabilitation Act, the ADA and the state and local claims should be dismissed. Case law makes clear that the only cause of action available to a federal employee who alleges discrimination on the basis of a disability is through section 501 of the Rehabilitation Act. *Rivera v. Heyman*, 157 F.3d 101, 103 (2d Cir. 1998). Plaintiff’s silence in his opposition papers all but concedes the point. As such, the Court should dismiss all claims besides those under the Rehabilitation Act.

The Government further contends that Plaintiff's suit should be dismissed against all Defendants except the Administrator of the EPA. "Section 501 of the Rehabilitation Act is subject to the procedures and remedies of Title VII." *Verdi v. Potter*, No. 08 CIV. 2687, 2010 WL 502959 at *4 (E.D.N.Y. Feb. 9, 2010); *see also* 29 U.S.C. § 794a(a)(1). Title VII provides for a private right of action against "the head of the department, agency, or unit, as appropriate." 42 U.S.C. § 2000e-16(c). Applied to Section 501 of the Rehabilitation Act, courts in this circuit have evenly held that the an agency's head is the one and only proper defendant. *See, e.g., Torres v. United States Department of Veteran Affairs*, No. 02 Civ. 9601, 2004 WL 691237, at *2 (S.D.N.Y. Mar. 31, 2004); *Nobriga v. Dalton*, No. 94 CV 1972, 1996 WL 294354, at *2 (S.D.N.Y. May 26, 1996); *Edinboro v. Department of Health and Human Services*, 704 F.Supp. 364, 365 (S.D.N.Y. 1988). On the other hand, there is no personal liability for "individuals with supervisory control over a plaintiff." *Tomka v. Seiler*, 66 F.3d 1295, 1313 (2d Cir. 1995).

Against this authority, Plaintiff asserts that Waverly and O'Connor are proper defendants under the statutory language of 42 U.S.C. § 2000e-16(c). Specifically, that as Regional Administrator and as supervisor of the Public Relations Team respectively, they are suable as heads of a "unit." In support of this interpretation, Plaintiff relies on *Fusco v. Perry*, No. 92-CV-1525, 1995 WL 65067 (N.D.N.Y. Feb. 9, 1995). But that case stands for precisely the opposite proposition. In *Fusco*, the court declined to follow several dated, out-of-circuit decisions that had allowed for multiple defendants. *Id.* at *2. Instead, the *Fusco* court held that when a federal employee brings a Title VII claim, "(1) only the head of a department, agency or unit may be sued . . . and (2) there can only be one defendant in such an action." *Id.* at *3. Thus the Administrator is the only proper defendant, and the Court should dismiss this suit against Defendants Waverly and O'Connor.

B. Plaintiff Has Failed to Administratively Exhaust Some, but Not All of His Claims

The Plaintiff urges four theories of discrimination: retaliation, improper denial of a reasonable accommodation, hostile work environment, and discriminatory denial of sick leave. The Court should grant Defendants' motion to dismiss the first three theories because the Plaintiff failed to exhaust administrative remedies. On the other hand, because the Plaintiff has properly exhausted the discriminatory denial of sick leave, the Court should deny dismissal.

1. *Retaliation and Denial of a Reasonable Accommodation*

Defendants argue that Mr. Clark's claims of disparate treatment and retaliation must be dismissed because he failed to exhaust administrative remedies. As a union member, Mr. Clark is covered by a CBA with the Region. CBAs with federal agencies are, in turn, regulated by the Civil Service Reform Act ("CSRA"). *See* 5 U.S.C. § 2303(b)(1)(D). This law "requires unions and federal employers to include procedures for settling grievances in their collective bargaining agreements." *Fernandez v. Chertoff*, 471 F.3d 45, 52 (2d Cir. 2006). These procedures must include the option of "binding arbitration" for any party dissatisfied with the outcome of the negotiated grievance process. *Id.*

At the same time, a CBA-covered federal employee may still elect to seek relief under the statutory procedures of the Rehabilitation Act. *See* 5 U.S.C. § 7121(d) ([a]n aggrieved employee . . . may raise the matter under either a statutory procedure or the negotiated grievance procedure). Under the CSRA, "a federal employee who is aggrieved by discriminatory personnel practices may, in the first instance, pursue his grievance under the negotiated grievance procedure or the statutory complaint procedure, *but not both.*" *Fernandez*, 471 F.3d at 52 (emphasis in the original). A plaintiff who chooses the negotiated grievance procedure "commits to resolving his grievance in

accordance with the procedures prescribed in the collective bargaining agreement” rather than via the statutory procedure. *Id.* The choice is “irrevocable.” *Id.* (emphasis omitted).

The grievant who elects the negotiated procedure may appeal the outcome of arbitration to the Equal Employment Opportunity Commission (“EEOC”). *Id.* at 54 (2d Cir. 2006); *see also* C.F.R. § 1614.401(d) (“A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure”). Moreover, EEOC review is a prerequisite to judicial review: “[A]n employee who chooses the negotiated grievance procedure *must* appeal the arbitrator's award to the EEOC before bringing suit.” *Fernandez*, 417 F.3d at 54 (emphasis added).

Of the three grievances that Plaintiff lodged, two are relevant to discrimination. The grievance alleging retaliation and the grievance alleging a wrongful denial of a reasonable accommodation both describe potentially discriminatory conduct. By filing grievances with his union, he opted into the negotiated grievance procedure for these disputes. *Upshur v. Dam*, No. 00-CIV-2061, 2003 WL 135819 at *5 (S.D.N.Y. Jan. 17, 2003). Indeed, Mr. Clark made use of this procedure, escalating these grievances through various “steps” outlined in his CBA. *See id.* at 14-16, 19.

In April of 2021, a mediation was held to address the safety violation and retaliation grievances. *Id.* at 20. Plaintiff then participated in an Arbitration in June of 2021. *Id.* at 23. The Complaint does not the outcome of the arbitration, nor does it allege that the Plaintiff appealed the outcome to the EEOC. To exhaust a claim, “an employee must appeal the final result of the union grievance procedure with the EEOC.” *Gamble v. Chertoff*, No. 04 CIV. 9410, 2006 WL 3794290 at *4 (S.D.N.Y. Dec. 27, 2006). Because he failed to appeal, Plaintiff has failed to exhaust his claim.

Accordingly, the Court should dismiss all claims arising out of the denial of a reasonable accommodation and retaliation.

Plaintiff offers several unavailing counterarguments. First, he argues that because his CBA does not require that Rehabilitation Act claims be exclusively brought under a negotiated grievance procedure, he cannot be precluded from invoking the statutory procedure. ECF No. 16 (“Pl.’s Opp’n”) at 3. He supports this argument with citations to cases holding that non-federal employees do not waived their right to litigate antidiscrimination claims in court unless they have specifically agreed to mandatory arbitration thereof. *See, e.g., Lawrence v. Sol G. Atlas Realty Co. Inc.*, 841 F.3d 81, 84-85 (2d Cir. 2016). But this misses the point. Under the CSRA, Mr. Clark did have a choice between a grievance procedure and an administrative procedure. What he cannot do is pursue both. By filing a union grievance, he locked himself into the negotiated grievance procedure.

Second, Mr. Clark argues that he did, in fact, timely initiate the EEO process for his retaliation and reasonable accommodation claims. He filed a formal EEO complaint on February 18, 2021. FAC at 16. That complaint made two allegations: first that his reasonable accommodation requests were denied, and second that his request for sick leave was denied. ECF No. 14-1, at 1. The EEO complaint, however, was filed *after* he grieved the denial of his accommodation request to his union as part of his retaliation grievance in December of 2020. The Region’s EEO office recognized this and dismissed the issue of a reasonable accommodation as required by regulation. *Id.*; *see also* 16 C.F.R. § 1614.107(a)(4) (requiring the dismissal of a claim “[w]here complainant has raised the matter in a negotiated grievance procedure”).

2. Hostile Work Environment

The Complaint further makes a hostile work environment claim. The Government argues for its dismissal on the grounds that it was never raised in a union grievance or a formal EEO charge. The Plaintiff argues that his EEO complaint exhausts his hostile work environment claim, despite the fact that the complaint does not explicitly include it. Pl.’s Opp’n at 9. To be properly exhausted, claims filed in federal court “must have been either explicitly raised during the EEO process or be ‘reasonably related’ to the claims that were.” *Hodges v. Attorney General of the United States*, 976 F. Supp. 2d 480, 490 (S.D.N.Y. 2013) (quoting *Butts v. City of New York Department of Housing, Preservation & Development*, 990 F.2d 1397, 1401-03 (2d Cir. 1993)). A claim can reasonably related to the EEO charge if “the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. *Butts*, 990 F.2d at 1402. This exception to the exhaustion requirement “‘is essentially an allowance of loose pleading’ and is based on the recognition that EEOC charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is to alert the EEOC” that the plaintiff is suffering discrimination. *Deravin v. Kirk*, 335 F.3d 195, 201 (2003) (internal quotations omitted).

“The ‘reasonably related’ inquiry requires a fact-intensive analysis.” *Mathirampuzha v. Potter*, 548 F.3d 70, 76 (2d Cir. 2008) The court must focus “on the factual allegations made in the [EEO] charge itself, describing the discriminatory conduct about which the plaintiff is grieving.” *Deravin*, 335 F.3d at 201. “The question is . . . whether the charge “contain[s] the ‘factual underpinnings’ of a hostile work environment . . . claim.” *Mathirampuzha*, 548 F.3d at 77. Thus, for a hostile work environment claim to be reasonably related to the charge, the charge must contain facts that suggest that the Region is “permeated with discriminatory intimidation, ridicule, and insult, that is

sufficiently severe or pervasive to alter the conditions of the victim's employment.” *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993). Moreover, “the misconduct shown must be severe or pervasive enough to create an objectively hostile or abusive work environment.” *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir.2002). The facts alleged in the charge must be considered under “all the circumstances,” with special attention to the “frequency and severity of conduct.” *Williams v. New York City Hous. Auth.*, 61 F.4th 55, 74 (2d Cir. 2023).

Plaintiff’s EEO charge does not contain the factual underpinnings of a hostile work environment claim. All in all, the charge describes two instances over several months in which the Region denied Mr. Clark sick leave. But mere denial of leave—even when it causes the Plaintiff mental anguish—fails to “rise to the level of *objectively* severe and persistent harassment.” *Lee v. Saul*, No. 19-CIV-6553, 2022 WL 873511, at *14-13 (S.D.N.Y. Mar. 23, 2022) (emphasis added). Without allegations of more serious harassment, the EEOC cannot reasonably be expected to have included a hostile work environment in its investigation of Mr. Clark’s charge. Because Plaintiff has failed to exhaust his hostile work environment claim, the Court should grant the Government’s motion to dismiss it.

3. *Denial of Sick Leave*

The Plaintiff never raised his denial of sick leave in a union grievance. Rather, by “fil[ing] a formal written complaint under the statutory EEO complaint procedure,” the Plaintiff properly elected the statutory route. *Savarese v. U.S. Dep’t of Hous. & Urb. Dev.*, No. 04 CIV. 3660, 2005 WL 387152 at *2 (S.D.N.Y. Feb. 16, 2005). If the relevant agency does not take final action on a complaint within 180 days after its filing, the complainant may bring an action in United States district court. 29 C.F.R. § 1614.407(b). Mr. Clark filed a formal complaint with the EPA’s central EEO office on February 18, 2021. The allegations that the EEOC agreed to investigate were

discriminatory denials of four requested days of sick leave. 18-1; 18-6. When this suit was in September of 2022, over 180 days later, the EPA had still not taken final action on the complaint. Thus the denial of sick leave claim was administratively exhausted and is properly before the Court. The motion to dismiss this claim should be denied.

Conclusion

For the foregoing reasons, the Court should grant Defendants' motion to dismiss claims under the ADA and state law, as well as any claim against Defendants O'Connor and Waverly. The Court should also dismiss all claims arising out of retaliation, improper denial of a reasonable accommodation, or a hostile work environment. On the other hand, the Court should deny Defendants' motion to dismiss claims arising out of the discriminatory denial of sick leave.

Applicant Details

First Name	Simon
Middle Initial	G
Last Name	Ciccarillo
Citizenship Status	U. S. Citizen
Email Address	ciccarillo.s24@law.wlu.edu
Address	<div> Address Street 550 Borden Road, Apt. A2 City Lexington State/Territory Virginia Zip 24450 Country United States </div>
Contact Phone Number	860-402-8649

Applicant Education

BA/BS From	Dickinson College
Date of BA/BS	May 2016
JD/LLB From	Washington and Lee University School of Law
	http://www.law.wlu.edu
Date of JD/LLB	May 10, 2024
Class Rank	50%
Law Review/Journal	Yes
Journal(s)	Washington and Lee Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Davis Moot Court Competition

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Professional Organization

Organizations	Just the Beginning Organization
---------------	--

Recommenders

Miller, Russell
millerra@wlu.edu

Eggert, David
eggertd@wlu.edu
540-458-8335

Robell, Jonathan
jonathan.robell@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 13, 2023

The Honorable Juan R. Sanchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez:

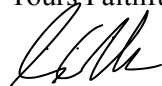
I am a second-year student at Washington and Lee University School of Law, and I write to apply for a clerkship position in your chambers after my graduation in 2024. I am excited about returning to Pennsylvania, where I went to Dickinson College during my formative years.

I believe I offer a unique perspective and skillset that would be of true use to you in chambers. While I have frequently been fortunate in life, for example being brought out of extreme poverty in Colombia to a far better life in the United States, I have faced adversity. This is no truer than in the academic field. I was never someone to whom academic pursuits came easily, and in fact had to work incredibly hard to do modestly well. For that reason, I did not always consider clerking to be a viable opportunity I could or should pursue. I never let my initial struggles discourage me. I pride myself on taking ownership of my shortcomings, and then doing everything I can to learn from and improve on them. Having to put in real work to succeed has allowed to work most effectively in collaborative environments. Additionally, I find your example as a Hispanic chief judge to be inspiring. I have struggled at times as a Latino in the legal field, but I know your example as a mentor would be truly invaluable. This is especially true because of my dedication to being a career public servant. Since my time working at DOJ's Criminal Division, I have been inspired to serve the public through just and impartial enforcement of the law. I believe those qualities to be hallmarks of your jurisprudence, and that clerking in your chambers would continue to foster that desire to serve even more.

My perspective on clerking, and my research and writing abilities dramatically changed during my first summer internship when I worked for the Honorable Anthony J. Trenga at the Eastern District of Virginia in Alexandria. After becoming invested in clerking, I tailored my experience in law school to include similar experiences going forward. I further developed my research and writing skills through writing my Law Review note, which was selected for publication. Next year, I will be externing for the Honorable Joel Hoppe in the Western District of Virginia. While there, I will continue researching and writing, while increasing my familiarity with chambers. This summer, I am exercising those same skills for the DOJ.

I am confident I possess the requisite skills to be a successful clerk in your chambers. My several years of work at DOJ before law school grounded me in the real-world workforce. My time in law school has provided a series of experiences demonstrating I am a strong researcher and writer. And I hope the next step in this process will be as a member of your chambers by assisting you in chambers. Thank you very much for your consideration of my application.

Yours Faithfully,



Simon Ciccarillo

SIMON CICCARILLO

550 Borden Road, Apartment A2 • Lexington, VA 24450 • 860.402.8649 • ciccarillo.s24@law.wlu.edu

EDUCATION

Washington and Lee University School of Law, Lexington, VA

Juris Doctor Candidate, May 2024 (Cum. GPA: 3.273, Spring 2023 GPA: 3.533)

- **Journal**: Lead Articles Editor, *Washington and Lee Law Review*
- **Publications**: *Scorched Earth: How Equal Footing Can Solve the Western Water Crisis*, Law Review Volume 81
- **Honors**: Member, Omicron Delta Kappa
- **Moot Court**: Quarterfinalist: Mock Trial Competition; Participant: Grey Negotiations Competition, Davis Moot Court Competition, Client Counseling Competition
- **Externship**: Judge Joel Hoppe, U.S. District Court for the Western District of Virginia, Harrisonburg, VA
- **Activities**: Vice President: Federalist Society; Latin American Law Student Association; Christian Legal Society, International Law Society; Contributing Writer, The Law News; Volunteer, Blue Ridge Legal Services

Dickinson College, Carlisle, PA

Bachelor of Arts, cum laude, International Studies and Russian Studies, May 2016 (GPA: 3.52)

- **Honors**: Sigma Iota Rho National Honors Society; Dobro Slovo Slavic Studies National Honors Society
- **Internships**: U.S. Army War College, Department of National Security and Strategy; Safe Horizons, Department of Law and Government; Senate of Colombia, Juan Mario Laserna; Michalik, Bauer, Silvia & Ciccarillo LLP
- **Publications and Interviews**: Testigo Directo News Interviews (2021); *The Russia-Latin America Nexus: Realism in the 21st Century* (2016); *International Relations Between Russia and Latin America* (2016); *Diplomacy vs. Hostility in the Ukraine: Managing the Escalating Crisis* (2015); *The Future of U.S.-Russian Relations: Looking to Young Leaders to Bridge the Diplomatic Gap* (2014)
- **Study Abroad**: Russian State University for the Humanities, Moscow

WORK EXPERIENCE

U.S. Department of Justice, Civil Division, Commercial Litigation Section, Washington, D.C.

Office of Foreign Litigation Intern, May 2023 – August 2023

- Wrote memorandums on domestic and international law of the sea, property law, employment law, and service.
- Maintained and updated a Department-wide compendium and drafted policy for new international customary law.

United States District Court for the Eastern District of Virginia, Alexandria, VA

Judicial Intern for the Honorable Anthony J. Trenga, May 2022 – July 2022

- Assisted with drafting orders and bench memoranda for a range of criminal and civil matters
- Observed criminal trials, hearings, and other court proceedings to note and research various legal issues

Washington and Lee University School of Law, Lexington, VA

Research Assistant for Professor Russell Miller, June 2022 – August 2023

- Drafted a 22-page memorandum on the development of the doctrine of primacy in EU law for book publication
- Researched using primary and secondary sources, Bluebook citations, and editing for articles

U.S. Department of Justice, Criminal Division, Fraud Section, Washington, D.C.

FCPA Unit Paralegal, September 2018 – June 2021

- Conducted research for and briefed prosecutors on discrete investigation details
- Prepared witnesses, interviews, evidence, trial materials, and coordinated discovery with opposing counsel
- Facilitated parallel investigations and support with agents from various federal agencies such as FBI, IRS, CFTC, SEC, as well as foreign prosecutors in matters of interest

Fragomen, Del Rey, Bernsen & Loewy LLP, Washington, D.C.

Administrative Assistant and Paralegal, May 2017 – May 2018

- Drafted immigration casework and documentation for large domestic corporations
- Provided translation services for client matters, and for pro-bono immigration work at the U.S.-Mexico border
- Assisted with filings, managed administrative team for data entry, cleanup, and organization

LANGUAGES, CERTIFICATION, & INTERESTS

Languages: Spanish (fluent); Russian (proficient)

Certification: Public Trust Security Clearance

Interests: Latin Dance Instructor, Singing, Exploring Colombia and Russia, Brazilian Jiu Jitsu, Horseback Riding

Print Date: 06/01/2023

Page: 1 of 3

Student: Simon Gaetano Ciccarillo

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450-2116



SSN: XXX-XX-0986

Entry Date: 08/30/2021

Date of Birth: 08/23/XXXX

Academic Level: Law

2021-2022 Law Fall

08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	B	4.00	4.00	12.00	
LAW 140	CONTRACTS	B	4.00	4.00	12.00	
LAW 163	LEGAL RESEARCH	A	0.50	0.50	2.00	
LAW 165	LEGAL WRITING I	B-	2.00	2.00	5.34	
LAW 190	TORTS	C	4.00	4.00	8.00	

Term GPA: 2.713

Totals:

14.50

14.50

39.34

Cumulative GPA: 2.713

Totals:

14.50

14.50

39.34

2021-2022 Law Spring

01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	A-	4.00	4.00	14.68	
LAW 150	CRIMINAL LAW	B+	3.00	3.00	9.99	
LAW 163	LEGAL RESEARCH	A-	0.50	0.50	1.84	
LAW 166	LEGAL WRITING II	B-	2.00	2.00	5.34	
LAW 179	PROPERTY	B	4.00	4.00	12.00	
LAW 195	TRANSNATIONAL LAW	A-	3.00	3.00	11.01	

Term GPA: 3.324

Totals:

16.50

16.50

54.86

Cumulative GPA: 3.038

Totals:

31.00

31.00

94.20

2021-2022 Law Summer

05/22/2022 - 08/13/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 888	SUMMER INTERNSHIP	CR	1.00	1.00	0.00	

Term GPA: 0.000

Totals:

1.00

1.00

0.00

Cumulative GPA: 3.038

Totals:

32.00

32.00

94.20

Print Date: 06/01/2023

Page: 2 of 3

Student: Simon Gaetano Ciccarillo

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450-2116

**2022-2023 Law Fall**

08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 685	Evidence	B+	3.00	3.00	9.99	
LAW 708	Financial Literacy For Lawyers	C+	1.00	1.00	2.33	
LAW 739	Federal White Collar Crime	A	3.00	3.00	12.00	
LAW 771	National Security Law and Practice	A-	2.00	2.00	7.34	
LAW 806	Habeas Corpus Practicum	A-	3.00	3.00	11.01	
LAW 911	Law Review: 2L	CR	2.00	2.00	0.00	

Term GPA: 3.555**Totals:**

14.00

14.00

42.67

Cumulative GPA: 3.182**Totals:**

46.00

46.00

136.87

2022-2023 Law Spring

01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 690	Professional Responsibility	B	3.00	3.00	9.00	
LAW 716	Business Associations	B	4.00	4.00	12.00	
LAW 725	Conflict of Laws	A	3.00	3.00	12.00	
LAW 804	Environmental Litigation Practicum	A	3.00	3.00	12.00	
LAW 865	Negotiations and Conflict Resolution Practicum	A	2.00	2.00	8.00	
LAW 911	Law Review: 2L	CR	2.00	2.00	0.00	

Term GPA: 3.533**Totals:**

17.00

17.00

53.00

Cumulative GPA: 3.273**Totals:**

63.00

63.00

189.87

2023-2024 Law Fall

08/28/2023 - 12/18/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 700	Federal Jurisdiction and Procedure		3.00	0.00	0.00	
LAW 707L	Skills Immersion: Litigation		2.00	0.00	0.00	
LAW 733	Criminal Procedure: Investigation		3.00	0.00	0.00	
LAW 811	Appellate Advocacy Practicum		4.00	0.00	0.00	
LAW 934	Federal Judicial Externship		2.00	0.00	0.00	
LAW 934FP	Federal Judicial Externship: Field Placement		2.00	0.00	0.00	

Term GPA: 0.000**Totals:**

16.00

0.00

0.00

Cumulative GPA: 3.273**Totals:**

63.00

63.00

189.87

Print Date: 06/01/2023

Page: 3 of 3

Student: Simon Gaetano Ciccarillo

Lexington, Virginia 24450-2116

WASHINGTON AND LEE
UNIVERSITY



Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	63.00	63.00	3.273
External:	0.00	0.00	
Overall:	63.00	63.00	3.273

Program: Law

End of Official Transcript



WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my pleasure to write at this time to offer the strongest and most enthusiastic possible support for Simon Ciccarillo's application for a clerkship in your chambers. A judicial law clerk must have an impressive command of the law, must be an excellent researcher and writer, must embody the highest degree of professionalism, and must be a pleasure to work with. Simon possesses all of these qualities. There is no other way for me to say it: Simon is one of the most impressive students with whom I have ever worked.

I offer my unqualified support of Simon on the basis of three distinct perspectives.

First, I understand that Simon is an excellent student. His impressive performance in law school demonstrates his ability to grasp legal theory and to learn legal doctrine. I can confirm from my contact with Simon that his academic success transcends the fulfillment of the duty to study and then take exams. I found Simon to be genuinely animated by the intellectual endeavor that is the study of the law. He is prepared for his classes. His curiosity and enthusiasm lead him to ask questions, offer comments, and explore issues beyond the required assignments. Simon is an excellent student of the law.

Second, Simon has served for the last two years as my research assistant. This gives me insight into his excellent research and writing skills, his exceptional professionalism, and his admirable character. Simon is far and away the best research assistant I have ever employed.

Simon has worked for me on a wide range of scholarly projects that required him to engage with complex legal issues from different subjects, different jurisdictions, and different disciplines. Sometimes he did this work under brutally short deadlines. The memos he produced for me are comprehensive, creative, concise, and correct on the law. With modest adaptations for style or tone, I have been able to rely on his written work as a foundation for my final product. That has never before been the case with one of my research assistants. I doubt I will ever be so fortunate again. Simon is a self-starter. He is impressively disciplined and he is always on time with assignments. He sought direction when he needed it. He was open to constructive criticism, because he wanted to produce the best possible product and because he was determined to improve as a young lawyer. Throughout his work for me Simon has exhibited the maturity, responsibility and initiative of a seasoned and reliable professional. I would not hesitate to entrust Simon with any task, no matter how complex or sensitive.

Third, through all of my close contacts with Simon I have had the chance to get to know a lot about his character and personality. Simon is a flexible, open-minded, and confident soul. In our casual conversations he has revealed a sharp and insightful wit, which he deploys to great effect. Simon is a gracious and fun conversationalist. He combines an impressive intellect with extraordinary emotional intelligence. Simon will enrich and enliven your chambers.

It is on the basis of this broad evaluation of Simon's ability and character that I enthusiastically recommend him as an extraordinary young lawyer and person. You will have applications from scores of well-qualified applicants. But you will not find a peer for Simon.

If you have any further questions, please do not hesitate to contact me.

Sincerely,

Russell A. Miller
J.B. Stombock Professor of Law

Russell Miller - millerra@wlu.edu

WASHINGTON AND LEE
UNIVERSITY SCHOOL OF LAW
LEXINGTON, VA 24450

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write this letter in enthusiastic support of Simon Ciccarillo's application as a judicial clerk.

I have known Simon for two years in my capacity as a professor at Washington and Lee Law School and as faculty advisor to several student organizations. I am thoroughly impressed with Simon as a diligent student, a conscientious and disciplined worker, and as a highly ethical person.

Two quick stories will demonstrate Simon's resourcefulness, integrity, consensus building skills and ability to meet challenges.

First, an example showing Simon's resourcefulness, his ability to meet challenge and his capacities as a student. Although Simon was an excellent student in college, he frankly had some academic difficulty in his first semester of law school. In addition to teaching Property, Conflict of Laws, Remedies, and Complex Litigation, I serve as the Director of our school's Academic Success program. After his first semester, Simon was one of the student's referred to me to obtain assistance in adjusting to law school academics. I met with him on several occasions and was greatly impressed by his resolve and dedication. I was confident that he would improve. But even I was astonished by how much he improved. In my 15 years teaching, I don't believe I have ever seen a student improve his/her GPA from the first to the second semester as much as Simon did. He improved so much that he was selected to serve on the law review, where he has been excelling. Every year, I devote a workshop that is heavily attended by most 1L students to a panel of upperclassmen explaining to the first-year students how to prepare for and take exams – obviously a matter that causes lots of anxiety for most 1Ls. I asked Simon (then a 2L) to be one of the presenters. I was so impressed with the way he handled himself, frankly telling his counterparts where he had gone astray in his first semester and what he had learned about improving his performance. After the session, students flocked to him for further conversation and advice. Very impressive. Very humble. Very honest. And a great service to other students.

Second, I also spoke with Simon earlier this year when he was deciding what topic he would choose for his law review note topic. Once again, he impressed. He had several topics and had excellent ideas for all of them. His tentative analysis showed excellent legal thinking but also creativity and an ability to determine what issues would likely be of interest in today's society.

In sum, Simon has shown to me that he is a person of great integrity and great resourcefulness. He faces personal and other challenges with courage and humility. He will be a fantastic lawyer and would make a wonderful judicial clerk. I heartily support his application.

Sincerely,

David Eggert
Professor of Practice

David Eggert - eggertd@wlu.edu - 540-458-8335



U.S. Department of Justice

Criminal Division

Fraud Section

Washington, D.C. 20530

December 18, 2022

To whom it may concern:

I write to provide a reference and recommendation for Simon Ciccarillo.

I know Simon through our nearly three years of work together in the Fraud Section at the Criminal Division of the Department of Justice, where I serve as an Assistant Deputy Chief.

As a paralegal in our office, Simon ably handled a flood of information related to complex criminal investigations, helping to ensure that our investigations were thorough and that we were trial-ready when we were ready to charge. I believe his experience at the Department, along with his other experiences before and during law school, will serve him well in a judicial clerkship. His breadth of experience—and, more importantly, his judgment and temperament—will make him a valuable member of any chambers fortunate enough to hire him.

Please let me know if I can provide additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan P. Robell".

Jonathan P. Robell
Assistant Deputy Chief
Fraud Section

SIMON CICCARILLO

550 Borden Road, Apartment A2 • Lexington, VA 24450 • 860.402.8649 •
ciccarillo.s24@law.wlu.edu

Writing Sample

The attached writing sample is a court order I drafted my 1L summer for a Compassionate Release and Sentence Reduction Petition while at the Eastern District of Virginia as a judicial intern. The assignment entailed researching relevant caselaw, analyzing and applying it to the relevant facts, and drafting the full order. While this is not the complete version of the order, it comprises the Compassionate Release claim. While the total 21-page order is complete and available upon request, it and this truncated version are redacted for background and/or sensitive information to protect the individuals involved in the suit. Finally, I received permission to use this as a writing sample from Judge Trenga.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,)
)
 v.)
)
)
)
)
 Defendant.)
 _____)

[REDACTED]

ORDER

This matter is before the Court on Defendant [REDACTED] (the “Defendant”) pro se Motion for Compassionate Release/Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A) (the “Motion”), [Doc. No. 53] (“Mot.”), and Emergency Supplemental Motion Pursuant to the First Step Act § 603(b) and 18 U.S.C. § 3582(c) (collectively, the “Motions”). The United States (the “Government”), submitted its Opposition to the Motions (the “Opposition”), [Doc. No. 58] (“Opp.”), and objects on the grounds that Defendant has not properly exhausted his administrative remedies under 18 U.S.C. § 3582(c)(1)(A), that Defendant cannot demonstrate “extraordinary and compelling” reasons to warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A), and that the relief Defendant seeks under § 404 of the First Step Act is neither authorized nor warranted under the circumstances. For the following reasons, Defendant’s Motion for Compassionate Release is **DENIED** but Supplemental Motion for Sentence Reduction is **GRANTED**.

I. BACKGROUND

In 1999, Defendant was convicted for Conspiracy to Possess with Intent to Distribute Fifty Grams or More of Cocaine Base in violation of 21 U.S.C. §§ 841(a)(1) and 846 and sentenced to 292 months of imprisonment, which was reduced to 146 months and four years of supervised release. [Doc. No. 22] (“PSR”) at 14. After serving his term, Defendant was released in April 2008 to complete his supervised release. *Id.* at 15. However, on October 14, 2011, during his supervised release, Defendant was rearrested on a new criminal offense, Conspiracy to Distribute Twenty-Eight Kilograms or More of Cocaine Base and sentenced to 12 months imprisonment for a violation of supervised release (the “2011 Supervised Release Sentence”). *Opp.* at 2; *see generally* 1:99-cr-254 (LMB) [Doc. No. 125]. Defendant then pled guilty on October 18, 2011 to the underlying Conspiracy to Distribute offense; and based in part on being considered a Career Offender, the guideline sentencing range of 188 to 235 months was calculated based on a total offense level of 29 and a Criminal History Category of VI. [Doc. No. 28]. He was then sentenced in January 2012 to 150 months with 8 years of supervised release (the “2012 Sentence”), [Doc. No. 27], based in part on his acceptance of responsibility. This sentence was added onto his 2011 Supervised Release Sentence increasing his period of incarceration to 162-months. *Suppl. Mot.* At 1; *see generally* 1:99-cr-254 (LMB) [Doc. No. 125]. Defendant is currently scheduled to be released on January 24, 2023. *Mot.* At 2.

On October 28, 2021, Defendant filed the Motion requesting that the Court grant compassionate release under 18 U.S.C. § 3582(c)(1)(A) based on alleged water contamination at the FCI [REDACTED], the threat from the COVID-19 pandemic, and Defendant’s conduct and rehabilitation. *Id.* at 1. On December 2, 2021, Defendant filed an Emergency Supplemental

Motion requesting a sentence reduction based on the reduced sentence he should have received under the First Step Act of 2018, presumably with respect to his 2012 Sentence.¹ Suppl. Mot. at 1. The request is in part based on recent intervening Fourth Circuit caselaw.² *Id.* The Government submitted its response in opposition on December 17, 2021. *See generally* Opp. At present, Defendant has served over 90% of his sentence. [Doc. No. 53-1] Mot. at 22.

II. LEGAL STANDARD

A. Compassionate Release

18 U.S.C. § 3582(c)(1)(A) provides that, “upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier,” a sentencing court “may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—(i) extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” *United States v. Redd*, 444 F. Supp. 3d 717, 722 n.6 (E.D. Va. 2020) (quoting 18 U.S.C. § 3582(c)(1)(A)). The Fourth Circuit recently explained, however, that, “[w]hen a defendant exercises his new right [under the First Step Act] to move for

¹ Although the Suppl. Mot. is not entirely clear on this point the Court has construed it most favorably to him as a pro se litigant. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007)

² *See* cases cited *infra* note 9.

compassionate release on his own behalf . . . [the relevant policy statement found in U.S.S.G.] § 1B1.13 [pertaining to compassionate release recommendations by the BOP] does not apply,” and the extraordinary and compelling reasons listed in § 1B1.13 “do[] not constrain the discretion of district courts.” *See United States v. McCoy*, 981 F.3d 271, 281 (4th Cir. 2020). Nevertheless, Section 1B1.13 “remains helpful guidance.” *Id.* at 279. In that regard, U.S.S.G. § 1B.13 cmt. n.1(A)–(D) defines “extraordinary and compelling reasons” to include the defendant’s medical condition, age, family circumstances, or other reasons that are sufficiently extraordinary and compelling to warrant a sentence reduction. *Id.* at 280.

B. First Step Act Motion

The First Step Act of 2018 permits “[a] court that imposed a sentence for a covered offense . . . [to] impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.” First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222. The First Step Act defines a “covered offense” as “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010.” *Id.* § 404(a), 132 Stat. at 5222. Sections 2 and 3 of the Fair Sentencing Act of 2010 (“FSA”), in turn, modified the penalties for violations of the crack cocaine statutes at 21 U.S.C. § 841, by increasing the threshold quantities of cocaine base required to trigger the sentencing ranges in § 841(b)(1)(A)(iii) from 50 grams to 280 grams and in § 841(b)(1)(B)(iii) from 5 grams to 28 grams. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

“[A] district court presented with a First Step Act motion to reduce a sentence must first determine whether the sentence...is ‘eligible’ for consideration ‘on the merits.’” *United States v. Lancaster*, 997 F.3d 171, 174 (4th Cir. 2021) (quoting *United States v. Gravatt*, 953 F.3d 258, 262 (4th Cir. 2020)). A sentence is eligible for review if: 1) the sentence sought to be reduced is for a “covered offense”³; 2) the motion for reduction must be addressed to the court that imposed the relevant sentence; and 3) the sentence must not have been “previously imposed or previously reduced” pursuant to the FSA, and the petitioner must not have previously filed a motion under § 404 that was “denied after a complete review of the motion on the merits.” *Id.* (citing First Step Act, § 404(b), 132 Stat. at 5222).

According to the First Step Act of 2018, if a sentence qualifies for review on the merits, a district court has the discretion to impose a reduced sentence “as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.” Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018). The discretion to grant such relief is broad. *Id.* at § 404(c), 132 Stat. at 5222. However, the Fourth Circuit has mandated several steps district courts must take to ensure evaluation of the merits is “procedurally and substantively reasonable.” *United States v. Collington*, 995 F.3d 347, 358 (4th Cir. 2021). Namely, a district court must: 1) in retroactively applying the FSA, determine the new statutory range set by any amended statutory minimums and maximums, *id.* at 357; 2) recalculate the Sentencing Guidelines range by correcting original Guidelines errors and applying intervening case law made retroactive to the original sentence, *id.* at 355; and 3) reconsider the 18 U.S.C. § 3553(a)

³ A “covered offense” is “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010, that was committed before August 3, 2010.” First Step Act at § 404(a), 132 Stat. at 5222.

factors,⁴ *id.* In so doing, courts are able “to more comprehensively shape sentencing decisions and even depart downward from the new Guidelines range.” *Id.* Pursuant to 18 U.S.C. § 3661, courts may also consider post-sentencing conduct. *United States v. Chambers*, 956 F.3d 667, 674–75 (4th Cir. 2020).

III. COMPASSIONATE RELEASE ANALYSIS

A. Whether Compassionate Release Is Warranted

Defendant first seeks a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) based on “extraordinary and compelling reasons.” For the following reasons, the Court **DENIES** Defendant’s request for compassionate release.

1. The Threshold Requirement

As an initial matter, the Government contests whether Defendant fully exhausted his administrative remedies and therefore meets the threshold requirements of 18 U.S.C. § 3582(c)(1)(A). *Opp.* at 7–8. The Government claims because Defendant only initially raised the motion for compassionate release to the Warden of FCI [REDACTED], that Defendant is now unable to attach COVID-19, his rehabilitation and release plan, or invalid application of law to his claim before the Court. *Id.* However, failure to exhaust remedies can be excused particularly where the

⁴ 18 U.S.C. § 3553(a) factors: 1) the nature and circumstances of the offense and the history and characteristics of the defendant; 2) the need for the sentence imposed; 3) the kinds of sentences available; 4) the kinds of sentence and the sentencing range established for; 5) any pertinent policy statement; 6) the need to avoid unwarranted

arguments are legal and not factual. *United States v. Ferguson*, No. 3:04CR13-01, 2021 WL 1701918, at *4 (E.D. Va. Apr. 29, 2021). “[T]he text...plainly provides that a defendant may file a motion on his own behalf 30 days after the warden receives his request, regardless of whether the defendant exhausted his administrative remedies.” *United States v. Muhammad*, 16 F.4th 126, 129 (4th Cir. 2021); *United States v. Estelle*, No. 20-7471, 2022 WL 205418, at *1 (4th Cir. Jan. 24, 2022); *United States v. Spencer*, No. 20-7171, 2022 WL 355775, at *1 (4th Cir. Feb. 7, 2022). Accordingly, and because more than 30 days have passed since Defendant submitted his request to the BOP,⁵ his motion is ripe for review.

2. Merits

The court now considers whether Defendant has shown “extraordinary and compelling reasons” to justify a reduction in sentence. Defendant claims that such reasons are demonstrated due to a combination of the alleged water contamination at FCI [REDACTED], the COVID-19 pandemic, and Defendant’s rehabilitation and release plan.

a. Water Contamination

Defendant first turns to the alleged water contamination at FCI [REDACTED] to seek compassionate release. Mot. at 7–9. However, Defendant is no longer located at FCI [REDACTED] but is now located at FCI [REDACTED], at which Defendant “makes no similar complaints.” Opp. at 8. “The general rule is that a prisoner’s transfer or release from a jail moots his individual claim for declaratory and injunctive relief.” *McKinnon v. Talladega Cnty., Ala.*, 745

⁵ See Mot. at 4.

F.2d 1360, 1363 (11th Cir. 1984); *see also Holland v. Purdy*, 457 F.2d 802, 803 (5th Cir. 1972) (reasoning that because petitioner was not subjected to the conditions complained of at the time of litigation, the petition should have been dismissed for mootness).

b. COVID-19

Defendant also raises the general effects of the COVID-19 pandemic upon the prison population, and specifically, frequent and longer lockdowns, elimination of visits and phone use, and a generally increased risk of contraction upon Defendant to warrant release. Mot. at 11–12. But “the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP’s statutory role, and its extensive and professional efforts to curtail the virus’s spread.” *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020). Indeed, courts within the Eastern District of Virginia have previously declined to grant compassionate release where a defendant merely demonstrated a fear of contracting COVID-19.⁶ As such, these courts generally evaluate whether a defendant has “both a particularized susceptibility to the disease and a particularized risk of contracting the disease at his prison facility.” *United States v. White*, No. 2:07-cr-150, 2020 WL 1906845, at *1 n.2 (E.D. Va Apr. 17, 2020) (internal citation omitted).

Here, Defendant fails to present any specific medical claims of particularized risk of being susceptible to or contracting COVID-19. *See* Mot. at 11–12. At no point does Defendant point to any personalized medical issue that would increase his risk of contracting or suffering from COVID-19. *See generally* Mot. In fact, Defendant received two full doses of the Pfizer

⁶ *See United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020); *see also United States v. White*, No. 2:07-cr-150, 2020 WL 1906845, at *5 (E.D. Va Apr. 17, 2020); *Wilson v. United States*, 2:11-cr-180(5), 2020 WL 3315995, at *3 (E.D. Va. June 18, 2020); *United States v. Feiling*, 453 F. Supp. 3d 832 (E.D. Va. 2020).

COVID-19 vaccination,⁷ with availability of booster shots open to all inmates.⁸ And “for the vast majority of prisoners, the availability of a vaccine makes it impossible to conclude that the risk of COVID-19 is an extraordinary and compelling reason for immediate release.” *United States v. Broadfield*, 5 F.4th 801, 803 (7th Cir. 2021) (internal quotations and citation omitted). Because of the mitigating effect of the vaccine, the defendant must offer other evidence to provide an “extraordinary and compelling” reason for release. *United States of America v. Muhammad*, No. 3:14CR55, 2021 WL 3779632, at *2 (E.D. Va. Aug. 25, 2021), *aff’d sub nom. United States v. Muhammad*, No. 21-7354, 2022 WL 541619 (4th Cir. Feb. 23, 2022); *United States v. Stoddard*, No. 1:14-CR-76, 2021 WL 2379568, at *5 (E.D. Va. June 9, 2021), *reconsideration denied*, No. 1:14-CR-76, 2021 WL 4932556 (E.D. Va. June 28, 2021), *and aff’d*, No. 21-7463, 2021 WL 6116619 (4th Cir. Dec. 27, 2021), *and aff’d*, No. 21-7463, 2021 WL 6116619 (4th Cir. Dec. 27, 2021). But Defendant has not done so. Ultimately, Defendant’s seemingly adequate medical care does not favor compassionate release. *United States v. Brunson*, No. 3:12CR113, 2021 WL 2673114, at *2 (E.D. Va. June 29, 2021).

c. Rehabilitation and Release Plan

Defendant finally raises his rehabilitation and release plan as “extraordinary and compelling” reasons supporting compassionate release. Mot. at 10–11, 12–14. Notably, Defendant qualified as a minimum risk for recidivism based on “ongoing evaluation of [Defendant’s] history, work, performance, program performance, disciplinary reports, and more.”

⁷ See Suppl. Mot. at 6.

⁸ See *COVID-19 Vaccine Guidance*, BOP 4 (Oct. 13, 2021) https://www.bop.gov/resources/pdfs/covid_19_vaccine_guidance_v14_0_2021.pdf.

Mot. at 10. Defendant, having served more than 150 months in BOP custody, is now [REDACTED] and has demonstrated a commitment to lawful behavior. He has a minimal disciplinary record while incarcerated, with a disciplinary infraction for possessing a hazardous tool in 2019, and two prior infractions at or before 2003. [Doc. 53-1] Mot. at 17. Defendant has also “completed Drug Education,” a variety of Adult Continuing Education (ACE) courses, and mentoring/counseling groups.” *Id.* Defendant has proven to be a hard worker in his various capacities as a barber (where he served as a mentor and father-figure to other inmates and incarcerated youth), a pharmaceutical orderly, and a cleaning orderly. Mot. at 13. Additionally, Defendant maintains a standing job offer with a transportation company, as well as plans to continue as a community speaker and role model while staying at home with his mother if released. Suppl. Mot. at 9–10. However, while the Court commends Defendant on this progress, courts have not found such improvement sufficient for relief on the basis of compassionate release. *See United States v. Barcus*, No. 1:13-CR-00095 (RDA), 2022 WL 414283, at *7 (E.D. Va. Feb. 9, 2022); *Ross v. United States*, No. 2:19-CR-148, 2021 WL 3625310, at *2 (E.D. Va. Aug. 16, 2021). However, analysis of the 3553(a) factors will militate in favor of a sentence reduction, as found below.

IV. CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Defendant [REDACTED] Motion, [Doc. No. 53] be, and the same hereby is **DENIED**, but that Defendant [REDACTED] Supplemental Motion, [Doc. No. 55] be, and the same hereby is **GRANTED**; and it is further

ORDERED that Defendant [REDACTED] sentence is reduced to time served with all other applicable conditions applying.

This is a Final Order for the purposes of appeal. To appeal, Defendant must file a written notice of appeal with the Clerk's Office within fourteen (14) days of the date of this Order. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order Defendant wants to appeal. Defendant need not explain the grounds for appeal until so directed by the court.

The Clerk is directed to send a copy of this Order to the Defendant at the address listed in the record and to all counsel of record.

The Honorable Anthony J. Trenga

Alexandria, Virginia
July 15, 2022

Applicant Details

First Name	Sarah
Last Name	Claypoole
Citizenship Status	U. S. Citizen
Email Address	sarah.claypoole@duke.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>4130 Garrett Road, Apt. 1037</div> <div>City</div> <div>Durham</div> <div>State/Territory</div> <div>North Carolina</div> <div>Zip</div> <div>27707</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	7049067016

Applicant Education

BA/BS From	University of Chicago
Date of BA/BS	June 2017
JD/LLB From	Duke University School of Law
	https://law.duke.edu/career/
Date of JD/LLB	May 8, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Duke Law and Technology Review
	Duke Journal of Constitutional Law and Public Policy
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
--------------------------------------	----

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Grunwald, Ben
grunwald@law.duke.edu
919-613-7250
Fletcher, Gina-Gail
fletcher@law.duke.edu
919-613-7095

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sarah Claypoole
4130 Garrett Road, Apt. 1037
Durham, NC 27707

June 11, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Chief Judge Sánchez:

I am writing to express my strong interest in clerking for you during the 2024–2025 term. I am a rising third-year student at Duke Law School, and I expect to graduate in May 2024. I will be available to clerk any time after graduation. My younger sister is in Philadelphia, and your chambers' proximity to where she lives and works would be a boon.

I am confident I would excel as a clerk in your chambers. In my four years copyediting for the American Bar Association, I kept up with a variety of stakeholders while maintaining the quality of my work product. In this role, I managed an editorial board of lawyers, wrangled a set of other copyeditors, and engaged in institution-wide conversations around legal publishing and online presence. Juggling the exigencies of copyediting—moving commas and fixing prepositions—along broader strategic concerns provided multitasking skills I would use daily as a clerk. Moreover, this role developed my interest in working for the federal government through repeated exposure to regulators, prosecutors, and judges.

While at Duke Law, I have enhanced my ability to manage complexity while producing high-quality detail-oriented work. As the editor-in-chief of the *Duke Journal of Constitutional Law and Public Policy*, I balance the demands of a scholarly publication with the social aspects of incorporating peers into its daily work. Working as a research assistant for two professors with widely divergent interests—Professor Gina-Gail S. Fletcher, a scholar of complex financial instruments, and Professor Trina Jones, a scholar of employment discrimination—lets me practice the same dance between different frames of reference I would need as a clerk. Negotiating my identities as a queer, disabled woman in the profession has accustomed me to negotiating difference in the workplace, an important skill in a busy chambers.

Enclosed is my resume, Duke Law and University of Chicago transcripts, a writing sample drafted for my Risk Regulation course, and two letters of recommendation from Professors Gina-Gail S. Fletcher and Ben Grunwald, with a third available upon request. Please contact me if you need additional information. Thank you for your consideration.

Sincerely,
Sarah Claypoole
Sarah Claypoole

SARAH CLAYPOOLE

4130 Garrett Road, Apt. 1037, Durham, NC 27707

sarah.claypoole@duke.edu | (704) 906-7016

EDUCATION

Duke University School of Law, Durham, NC

Juris Doctor expected, May 2024

GPA: 3.61

Activities: Duke Journal of Constitutional Law and Public Policy, *Editor-in-Chief*
 Duke Law and Technology Review, *Staff Editor*
 Professor Gina-Gail S. Fletcher, *Research Assistant*
 Duke National Lawyers Guild, *Co-Director*
 Duke Law and Technology Society, *Executive Vice-President*
 OutLaw, *Member*

Pro Bono: Economic Justice Project, *Pro Bono Volunteer*

Duke Immigrant and Refugee Project, Afghan Asylum Project, *Pro Bono Volunteer*

University of Chicago, Chicago, IL

Bachelor of Arts in English Language & Literature and History, *General Honors*, June 2017

GPA: 3.52

Honors: Dean's List, 2014 – 2017

Departmental Honors in English Language & Literature and History

Theses: "What Is This Land, So Free?": Politics, Identity, and Intimacy in the Poetry of Frank O'Hara"; "Case Studies in Early Hypertension: Poems"

Activities: Doc Films, *General Chair, Assistant Projectionist*

South Side Weekly, *Literature Editor, Website Editor, Layout Editor*

EXPERIENCE

Freshfields Bruckhaus Deringer LLP, Washington, DC

Summer Associate, May 2023 – July 2023

- Drafting memoranda for clients on regulatory competition law issues.
- Assisting in drafting and reviewing documents for litigation, including complaints.

U.S. Securities and Exchange Commission, Division of Examinations, Washington, DC

Law Clerk, May 2022 – July 2022

- Conducted research and prepared memoranda with purpose of underlying future rulemaking.
- Guided review of internal documents, which led to several changes to policies.

American Bar Association, Chicago, IL

Editor, January 2018 – July 2021

- Acquired content, maintained editorial calendar, and copyedited articles for ABA's *Business Law Today* website, including researching legal developments and context for articles and overseeing peer review.
- Wrote and edited communications with 30,000 members of the Business Law Section, including emails, print communications, and information offered at in-person meetings and on webinars.

Getty Conservation Institute, Los Angeles, California

Communications Intern, June 2017 – September 2017

- Edited and drafted informative guides, articles, and publicity content on GCI's scientific, archeological, and art restoration initiatives for both general audiences and other experts in print and digital formats.

University of Chicago Press, Chicago, IL

Student Editorial Assistant, August 2014 – August 2015

- Managed of dozens of new social science projects for country's largest academic press.

ADDITIONAL INFORMATION

Spent a summer writing on a poetry grant from the University of Chicago. Waitressed at a ramen restaurant in last year of school to fund travel to Getty internship. Avid NBA fan and distance walker.

SARAH CLAYPOOLE

4130 Garrett Road, Apt. 1037
Durham, NC 27707

(704) 906-7016
sarah.claypoole@duke.edu

UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2021 FALL TERM

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Civil Procedure	Miller, D.	3.6	4.50
Contracts	Ward, J.	4.0	4.50
Torts	Coleman, D.	3.4	4.50
Legal Analysis, Research, Writing	Thomson, C.	<i>Credit Only</i>	0.00

2022 WINTERSESSION

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Civil/Military Law and Policy	Dunlap, C.	<i>Credit Only</i>	0.50

2022 SPRING TERM

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Constitutional Law	Young, E.	3.3	4.50
Criminal Law	Beale, S.	3.3	4.50
Property	Qiao, S.	3.4	4.00
Legal Analysis, Research, Writing	Thomson, C.	3.3	4.00

2022 FALL TERM

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Evidence	Garrett, B.	4.0	4.00
Labor Relations Law	Beale, S.	3.9	3.00
Criminal Procedure: Investigation	Grunwald, B.	3.8	3.00
Risk Regulation	Wiener, J.	3.8	2.00
Writing Federal Litigation	Hanson, M.	3.5	2.00
Readings: Privacy in a Post- <i>Dobbs</i> World	Dellinger, J.	<i>Credit Only</i>	1.00

2023 SPRING TERM

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Antitrust	Richman, B.	3.7	4.00
Civil Rights Litigation	Miller, D.	3.5	3.00
Administrative Law	Stuart, B.	3.8	3.00
Law and Economics Colloquium	Frakes, M. & Eldar, O.	3.7	2.00
Race and the Law	Jones, T.	<i>Credit Only</i>	1.00
Antitrust Plus Seminar	Richman, B.	<i>Credit Only</i>	0.50

2023 FALL TERM: PLANNED COURSES

<u>COURSE TITLE</u>	<u>CREDITS</u>
Federal Courts	4.00
Intellectual Property	4.00
Capstone	2.00
Ethics	2.00
Readings	1.00

TOTAL CREDITS: 59.50

CUMULATIVE GPA: 3.607

PLEASE FEEL FREE TO CONSULT [DUKE LAW'S GRADING POLICY](#).

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Sarah Claypoole

Dear Judge Sanchez:

I am thrilled to recommend Sarah Claypoole, a rising 3L at Duke Law School, for a clerkship in your chambers. In short, she's a gem—the kind of gem that's very impressive on paper and even brighter in person. So, let me start by asking you to interview her (even if she might not check every traditional box in your clerkship search)! I don't think you'll be disappointed.

Sarah grew up in Charlotte, North Carolina as a precocious child who probably stuck out at school. In the third grade, she provided free counseling for her peers during recess; in the fifth, she handed out hot pink business cards for her future career as a lawyer. Later, she enrolled in the University of Chicago to study literature and history, where she fell in love with writing in her academic coursework and internships at the university press and the Getty Conservation Institute.

Sarah's route to law school after graduation wasn't entirely direct. She got a job as an editor for the American Bar Association's home office. She didn't intend to go to law school when she started—she planned to stay in editing—but the four years of exposure to lawyers eventually convinced her. She also started reading extensively about law and policy during this period. As she told me, she may be the only person alive who attended the University of Chicago without developing any interest in economics who then developed said interest immediately after graduation. Those experiences, combined with a series of complicated illnesses in her family, led her to appreciate the power of law to help vulnerable people in need of aid from the state. Fortunately for us, all that inspired her to become a lawyer.

I first met Sarah as a 2L at Duke Law in my upper-level lecture called "Criminal Procedure: Investigations." She was quiet in class, but, on cold calls, she was always prepared, thoughtful, and analytically sharp. I got to know Sarah best through office hours, where she was a frequent participant. Her questions were uniformly deep, informed, and practically oriented. Sarah's performance on the final exam was also very strong, landing her a grade of 3.8. As I reread her exam, I am struck by the clarity and organization of her writing (on a time-constrained test no less) and the depth of her substantive analysis.

Sarah has had much success in other coursework as well. Her GPA, a 3.6, is quite strong at Duke. She received a 4.0 in Contracts and Evidence, a 3.9 in Labor Relations, and a 3.8 in Administrative Law and in Risk Regulation. In all honesty, while Sarah's grades are strong, I think her skills and abilities aren't fully reflected in the numbers. She strikes me as the type of slower, deeper thinker who may need a bit more time than available on the traditional law exam.

Sarah also brings to the table strong drafting skills. Her writing sample, although perhaps more academic than usual for a clerkship application, illustrates her capacity to communicate narrative through clear, fresh, and varied sentences. This talent is not the result of chance. Indeed, Sarah has invested a great deal of energy in her writing—from her four-year stint editing at the ABA to being the Editor in Chief of the Duke Journal of Constitutional Law and Public Policy and a Staff Editor on the Duke Law & Technology Review. For all these reasons, I was surprised to see that Sarah received only a median grade in 1L Legal Research and Writing. To understand what happened, I contacted Professor Casey Thompson, her teacher in that class. Thomson explained that, while Sarah's writing was very strong, her grade reflected a typical 1L struggle to render deep legal analysis on the page. Like so many other bright students in the same position, Thomson predicted that Sarah would develop these skills in her second and third years of law school.

From my perspective, at least two data points bear this prediction out. First, Sarah's exam in my Criminal Procedure class in 2L year was very strong. As always, the writing was crisp, clear, and well-organized. But more importantly, her legal analysis was deep and nuanced. I was particularly struck by her discussion of whether aiming a police camera at the exterior of a private home for several months qualifies as a search under the Fourth Amendment (and a line of cases like *Kyllo* and *Carpenter*). Second, I also read a legal memo Sarah wrote in another 2L class, and the analysis, again, struck me as quite strong. For all these reasons, I'm confident she has the analytic and writing skills to excel at a federal clerkship.

Beyond her professional talents, one of my favorite things about Sarah is her breath of knowledge—both legal and otherwise—and, even more striking, her intellectual curiosity. As just a few examples, she has served as a research assistant to three professors at Duke who span each end of the political spectrum: She wrote a memo for Professor Ernie Young about standing doctrine in Delaware, a memo about financial benchmarks and their capacity to be manipulated for Professor Gina-Gail Fletcher, and a memo on the history of critical legal movements for Professor Trina Jones. In addition, she's taken on a broad swath of topics in her coursework, including participating in the Law and Economics Colloquium and the Race and the Law Seminar during the same semester. As the editor in chief of her journal, she is also spearheading a symposium on the intersection between family and constitutional law, with the goal of developing the groundwork for an alternative to the popular "parents' rights"

Ben Grunwald - grunwald@law.duke.edu - 919-613-7250

paradigm. All these activities highlight Sarah's breadth of knowledge, intellectual curiosity, and passion for the law.

I'll finish where I started: Sarah is a gem. She's warm and thoughtful. She is roaringly funny. She has the intellectual curiosity of a child and the wisdom of someone far beyond her years. She also has no shortage of interesting hobbies, including reading science fiction and poetry and rooting for the Cleveland Cavaliers (she even has a large photo of LeBron James above the couch in her living room). She also enjoys art and museums and is fascinated by art restoration.

I mean it when I say few students have left such an impression on me, and I will genuinely miss her when she graduates Duke. So please, take this opportunity to interview her! She'd benefit greatly from a clerkship in your chambers before jumping into a career in antitrust law. Thank you for considering my recommendation. If there is anything further I can do to aid your decision, please do not hesitate to contact me.

Sincerely yours,
Ben Grunwald
Professor of Law

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Sarah Claypoole

Dear Judge Sanchez:

I write to recommend Sarah Claypoole to serve as a law clerk in your chambers. Sarah is undoubtedly the strongest research assistant I have had the privilege of working with in my over ten years of law teaching. She is diligent, smart, and hard-working. I am certain that she will be an excellent addition to your chambers, and I recommend her unreservedly.

I first met Sarah when she applied to be a summer research assistant in 2022. It readily became apparent that Sarah was unique. Sarah came to our interview having read two of my most recent law review articles; this is not something I ask, or even suggest, of students who want to be my research assistant. We had an in-depth discussion on various topics related to law and finance that far surpassed any conversations I have had in the past with a student about my work. Her genuine curiosity and interest were both refreshing and impressive, particularly because the conversation was not one in which Sarah attempted to grandstand or bluster; rather, she exhibited the type of sincere engagement one sees in those who enjoy learning. I left the interview with Sarah with no doubt that I wanted to hire her.

During our summer working together, Sarah worked part-time as my research assistant while also working for the Securities and Exchange Commission. Notwithstanding the demands of her position with the SEC, Sarah was able to complete multiple assignments for me throughout the summer. And, most notably, the quality of her work product surpassed that of my full-time research assistant. Sarah took a novel, yet thorough, approach to her assignments that was insightful and extraordinarily helpful.

Of the three summer research assistants I hired, Sarah was the only one who I asked to continue working with me during the 2022-2023 academic year. She has assisted me on a variety of projects, providing not only research and editing assistance, but also as a sounding board for new arguments and ideas. I trust her implicitly and have found working alongside her to be one of the highlights of my career as a law professor. Indeed, I was thrilled (but not surprised) to learn that Sarah is interested in academia. With her sharp mind, intellectual curiosity, and keen attention to detail, Sarah is the type of law student that is a joy to know and teach.

One of Sarah's best attributes is her strong writing and editorial skills. As a former editor of the American Bar Association, her way with words is both poetic and incisive. Sarah provided invaluable assistance with a recent article that examines the historical and contemporary contours of corporate social responsibility. Prior to submitting the article for publication, I tasked Sarah with providing detailed edits and comments on the piece, in terms of both structure and content. The article was immeasurably improved because of Sarah's tireless efforts. I am certain that she will bring a similar work ethic, diligence, and eagerness to learn to your chambers.

Finally, Sarah wants to clerk because she is genuinely interested in the law and the adjudication process. She wants to sharpen her skills as an attorney while learning from an experienced jurist. She is not motivated by perceptions of prestige, but instead by her innate desire to explore varied areas of the law and to learn from those around her to the fullest extent. It has been both an honor and privilege to get to know Sarah and to watch her develop over the past year. I will be thrilled to welcome her to the profession, as I am sure you will be to welcome her into your chambers.

Again, I enthusiastically recommend Sarah and would be thrilled to discuss her candidacy further.

Kind regards,

Gina-Gail S. Fletcher
Professor of Law

Gina-Gail Fletcher - fletcher@law.duke.edu - 919-613-7095

Sarah Claypoole
4130 Garrett Road, Apt. 1037
Durham, NC 27707
(704) 906-7016
sarah.claypoole@law.duke.edu

Writing Sample

This is an academic paper written for a course, Risk Regulation, that I took in Fall 2022. In the paper, we were asked to use course material to write on a regulatory response to a broad societal risk. The paper was supposed to be longer than thirty pages, so, for the sake of space, I have omitted an introduction, a prior section analyzing the FDA's approach to risk, and four subsequent sections on COVID-19, hydroxychloroquine, differences and similarities between the crises, and recommendations for the FDA moving forward.

My paper covers two crises, separated by thirty years, when the FDA faced difficult choices about how to manage uncertainty about treatment patients believed they had a right to try. After developing a historical account and risk analysis of HIV drug approvals and the 2020 approval of hydroxychloroquine, I present takeaways and recommendations for regulatory action in future crises replete with significant patient advocacy. I received top-level comments from my professor on the paper, but none of those comments were specific to this section of the paper. I am happy to send the complete document upon request.

“Drugs into Bodies”: FDA Risk Determinations in a Crisis

Part Three: HIV/AIDs¹

A. The Disease

Human immunodeficiency virus (“HIV”) has been in the U.S. since at least the 1970’s.² The first regulatory response came in 1981, when the CDC formed a taskforce to study the increased prevalence of two opportunistic infections among gay men.³ The FDA licensed the first blood test to detect HIV in 1984.⁴ Because HIV functions by attacking the immune system, opportunistic infections are a primary mechanism of death in people with HIV.

AIDS is the consequence of untreated HIV, which is measured clinically by either a person’s number of CD4 cells or the presence of an opportunistic infection.⁵ AIDS is a retrovirus, which means that instead of being replicated through DNA duplication, it replicates through reverse transcription.⁶ Reverse transcription is the process by which retroviruses copy their RNA into DNA form for replication, then copy it back into RNA again.⁷

People with untreated AIDS survive about three years on average, which decreases to just a year once they have an opportunistic infection.⁸ One famous opportunistic infection, Kaposi’s sarcoma, is an angioproliferative cancer that fifteen percent of people with AIDS in the U.S.

¹ Though different scholars and activists have handled the naming conventions (HIV/AIDS, HIV-AIDS, HIV, AIDS) differently, I use “AIDS” to describe the disease activists fought and “HIV/AIDS” when referring pointedly to both.

² *About HIV*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (June 30, 2022), <https://www.cdc.gov/hiv/basics/whatishiv.html>.

³ *The AIDS Epidemic in the United States, 1981–early 1990s*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 26, 2021), <https://www.cdc.gov/museum/online/story-of-cdc/aids/index.html>.

⁴ *Id.*

⁵ *What are HIV and AIDS?*, HIV.GOV (June 15, 2022), <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/what-are-hiv-and-aids>.

⁶ DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 453 (2010).

⁷ *Id.* at 454.

⁸ HIV.GOV, *supra* note 5.

reported having to the CDC in 1989.⁹ Its incident rate remains three hundred to five hundred times higher in people living with HIV than in the general population.¹⁰ As Sarah Schulman explains:

AIDS is, in a sense, a catchall term, like *cancer*. It manifests differently in each person, and there are multiple strains. Once someone's immune system was compromised, they would get different infections, ranging from brain diseases to pneumonia, skin cancer, blindness, wasting, and more. It was the infections that debilitated and killed the person, not AIDS. Until the virus itself could be controlled, the second strategy was to try to control the infections as they appeared.¹¹

In the U.S., more than six hundred and seventy-five thousand people have died of AIDS, and more than a million Americans still live with HIV today.¹² Though more than half of new HIV infections occur in men who have sex with men, people who inject drugs also remain at high risk for HIV.¹³ Antiretroviral treatment has proved remarkably successful as a treatment for HIV/AIDS. Their success is complemented by the development of effective prophylactic treatment that can prevent transmission of HIV altogether.¹⁴ In recent years, there has been movement in developing an HIV vaccine that would induce an immune response to combat an HIV infection. Positive results were published earlier this month from a Phase 1 trial; this vaccine uses broadly neutralizing antibodies.¹⁵

⁹ Sophie Grabar & Dominique Costagliola, *Epidemiology of Kaposi's Sarcoma*, *CANCERS*, Nov. 14, 2021, at 4 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8616388/>.

¹⁰ *Id.*

¹¹ SARAH SCHULMAN, *LET THE RECORD SHOW: A POLITICAL HISTORY OF ACT UP NEW YORK, 1987–1993* 61 (2021).

¹² U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, *CDC FACT SHEET: TODAY'S HIV/AIDS EPIDEMIC* 1, 2 (Aug. 2016), <https://www.cdc.gov/nchhstp/newsroom/docs/factsheets/todaysepidemic-508.pdf>.

¹³ *Id.*

¹⁴ See *What is PrEP?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/stds-hiv-safer-sex/hiv-aids/prep> (last visited June 11, 2023) (describing the prophylactic treatment commonly used to prevent transmission of HIV).

¹⁵ See Jacqueline Howard, *HIV Vaccine Candidate Induces Immune Response in Early Clinical Trial: 'An Important Step Forward'*, *CABLE NEWS NETWORK* (Dec. 2, 2022), cnn.com/2022/12/01/health/hiv-vaccine-phase-1-study/index.html (discussing the promising results of a recent early-stage vaccine trial).

B. Nontraditional Drug Access at the Start of the AIDS Epidemic

The decades immediately before the AIDS crisis saw the FDA transform “from a law enforcement agency which brought deterrent actions against violators, into a more paper-bound generator of rules and regulations.”¹⁶ Because of its power over drug approval, even its “guidance” documents came to feel like something drug sponsors needed to acquiesce to.¹⁷ This allowed the FDA to do a kind of rulemaking without the formal strictures of the rulemaking process.¹⁸ The FDA sat at the intersection of two contrary currents in these decades: an emboldened (and empowered) deregulatory impulse, and a strong consumer protection movement, typified by Dr. Sidney Wolfe, a regular feature in Congressional hearings about the FDA’s decision-making.¹⁹

The FDA’s most publicized battle in the 1970’s was over laetrile, a substance isolated from apricot kernels that supporters claimed had anti-tumor properties.²⁰ Laetrile sat uneasily on the line between alternative medicine and traditional medicine, with support on both sides.²¹ The FDA granted then retracted an IND for clinical study of laetrile, and this infuriated supporters who proceeded to import it in large quantities from other countries.²² Several states legalized the possession of laetrile in the 1970’s, and a congressman introduced legislation aimed at repealing the FDA’s ability to consider efficacy of new drugs altogether in the wake of hearings on laetrile.²³ Finally, the Supreme Court tackled laetrile in *Rutherford v. United States*, with the

¹⁶ CARPENTER, *supra* note 6, at 360 (quoting James O’Reilly).

¹⁷ *Id.* at 381.

¹⁸ *Id.*

¹⁹ See generally *id.* at 399–419 (describing the historical and political developments that shaped the FDA’s growth during the second half of the twentieth century).

²⁰ *Id.* at 437.

²¹ *Id.* at 438.

²² *Id.* at 438–40.

²³ *Id.* at 442.